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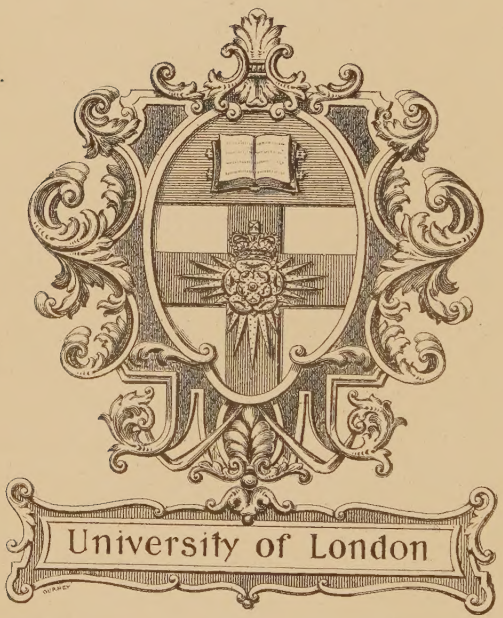

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AND THE

VICE-CHANCELLORS.

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Equity Cases

BEFORE

THE MASTER OF THE ROLLS,

AND THE

VICE-CHANCELLORS.

BROWNSON *v.* LAWRANCE.

M.R.

1868

March 2, 4, 7.

Will—Administration of Assets—Mortgage Debt—Direction to pay Debts out of Estate—Exoneration of mortgaged Estate—Specific Devise of Part of mortgaged Estate—Locke King's Act (17 & 18 *Vict. c.* 113).

In the will of a testator dying before the 1st of January, 1868, a direction that all his debts shall be paid "out of his estate" does not exclude the operation of *Locke King's Act* (17 & 18 Vict. c. 113).

Woolstencroft v. *Woolstencroft* (1) followed. *Eno* v. *Tatham* (2) distinguished.

The owner of the equity of redemption of two estates comprised in the same mortgage specifically devised one estate, and left the other to pass by a residuary devise:—

Held, that he thereby signified a "contrary or other intention" within the meaning of *Locke King's Act*, so as to make the estate which passed by the residuary devise primarily liable to the whole of the mortgage debt.

THOMAS LAWRANCE, who died in 1860, by his will dated the 31st of July in that year, after directing that "all his just debts" and funeral and testamentary expenses should be "fully paid and discharged out of his estate," gave and devised all his real and personal estate to the Plaintiffs, *H. Brownson* and *W. Lawrance*, upon trust to pay the rents and income thereof to his wife for her life, and after her death upon trust to pay the

(1) 2 D. F. & J. 347.

(2) 4 Giff. 181; on appeal, 32 L. J. (Ch.) 311.

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rents of certain estates, called *Nether Park* and *Blithe Meadow*, to *Robert Lawrance* for life, and after his death upon trust to sell those estates and divide the proceeds among such of his four nephews in the will named as should survive *Robert Lawrance*, and upon trust after the death of his wife to sell and get in all his other real and personal estate, and divide the proceeds among such of his fifteen nephews and nieces as should survive his wife, and he appointed the Plaintiffs his executors.

In 1856 the testator had mortgaged *Blithe Meadow*, with other property which passed by his will, to *W. Mason*, and in 1857 he had mortgaged *Nether Park*, with other property which passed by his will, to *J. Cooke*. Both these mortgages were subsisting at his death, and still remained unpaid. The testator's personal estate was insufficient for the payment of his debts.

The widow died in 1864, and in the same year the Plaintiffs instituted this suit against one of the testator's nephews for the administration of the testator's estate.

This was an application by *Robert Lawrance*, who had obtained liberty to attend the proceedings in the suit, for the payment to him of the whole of the rents of *Nether Park* and *Blithe Meadow*, raising the question whether, as between the applicant and the residuary devisees, those estates were liable to a proportionate part of the respective mortgage debts.

Mr. *Southgate*, Q.C., for the applicant:—

First: The applicant, as the specific devisee of *Nether Park* and *Blithe Meadow*, is entitled to have those estates exonerated from the mortgage debts out of the testator's residuary real estate. The testator, by directing payment of all his debts out of his estate, has "signified a contrary or other intention," within the meaning of *Locke King's Act* (17 & 18 Vict. c. 113), so as to exclude the operation of the Act: *Eno* v. *Tatham* (1); *Moore* v. *Moore* (2). These cases have overruled the previous decisions in *Woolstencroft* v. *Woolstencroft* (3) and *Rowson* v. *Harrison* (4). In *Maxwell* v. *Hyslop* (5) Vice-Chancellor *Malins* considered that

(1) 4 Giff. 181; on appeal, 32 L. J. (Ch.) 311.
(2) 1 D. J. & S. 602.
(3) 2 D. F. & J. 347.
(4) 31 Beav. 207.
(5) Law Rep. 4 Eq. 407.

the law was settled by *Eno* v. *Tatham* (1) and *Moore* v. *Moore* (2), and that he could not follow *Woolstencroft* v. *Woolstencroft* (3); and this view is confirmed by the 30 & 31 Vict. c. 69, which enacts that, in construing wills of testators dying after the 31st of December, 1867, a direction that all the testator's debts shall be paid out of his personal estate shall not be deemed to be a declaration of an intention to exclude *Locke King's Act*. There can be no distinction for this purpose between a direction for payment out of the testator's personal estate, and a direction for payment out of his estate generally, which includes his personal estate. Assuming that *Locke King's Act* is excluded, the residuary real estate is primarily applicable to the payment of the debts, since the 24th section of the *Wills Act* (1 Vict. c. 26) has done away with the doctrine that every devise is specific in its nature: *Dady* v. *Hartridge* (4); *Barnwell* v. *Iremonger* (5); *Rotheram* v. *Rotheram* (6); *Bethell* v. *Green* (7).

Secondly: As between each of the specifically devised estates and the property comprised in the same mortgage with it, which passed by the residuary devise, the latter is primarily liable to discharge the whole of the mortgage debt, the specific devise being of itself a sufficient indication of an intention contrary to the rule laid down by *Locke King's Act*, that every part of the mortgaged property shall bear a proportionate part of the mortgage debt. There has been no decision upon this point; but the editors of *Jarman* on Wills (8) express an opinion in favour of my contention.

Mr. *Baggallay*, Q.C., for the Plaintiffs:—

First: It has never been decided that *Locke King's Act* is excluded by a direction that the testator's debts shall be paid "out of his estate;" and *Woolstencroft* v. *Woolstencroft* is a clear decision the other way. *Eno* v. *Tatham* and *Moore* v. *Moore* are of no higher authority than *Woolstencroft* v. *Woolstencroft*,

(1) 4 Giff. 181; on appeal, 32 L. J. (Ch.) 311.
(2) 1 D. J. & S. 602.
(3) 2 D. F. & J. 347.
(4) 1 Dr. & Sm. 236.
(5) Ibid. 242.
(6) 26 Beav. 465.
(7) 34 Ibid. 302.
(8) 3rd ed. vol. ii. p. 611.

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and they are distinguishable from it. In *Eno* v. *Tatham* (1) there was a bequest of personal estate, subject to the payment of the testator's debts; and in *Moore* v. *Moore* (2), which was decided without argument, on the authority of *Eno* v. *Tatham*, there was a trust for payment of debts out of the residuary personal estate. Both those cases were decided on the ground that the testator had pointed out a particular fund for the payment of his debts; namely, his personal estate. But a direction for payment of the debts out of his estate generally implies that the debts shall be paid in such manner and out of such part of the estate as the law directs. In *Pembrooke* v. *Friend* (3) Vice-Chancellor *Wood* held that a direction that the debts should be paid as soon as might be did not exclude the Act, no particular property or class of property being expressly or impliedly pointed out as the fund out of which the debts should be paid. But assuming the Act to be excluded in this case, the specifically devised and residuary real estates are applicable *pari passu* to the payment of debts. The cases cited on the other side have been overruled by *Hensman* v. *Fryer* (4), where the Lord Chancellor held that the 24th section of the *Wills Act* has not affected the doctrine that every devise is specific.

Secondly: If, independently of *Locke King's Act*, specifically devised real estate is not entitled to exoneration out of the residuary real estate, an intention to exonerate it cannot be inferred from the mere fact of the specific devise of part of the mortgaged estate.

Mr. *Southgate*, in reply, referred to *Mellish* v. *Vallins* (5).

Mar. 4. LORD ROMILLY, M.R.:—

Upon the first question raised by this summons, I am of opinion that the testator, by directing that all his debts shall be paid out of his estate, has not signified an intention contrary to the rule

(1) 4 Giff. 181; on appeal, 32 L. J. (Ch.) 311.
(2) 1 D. J. & S. 602.
(3) 1 J. & H. 132.
(4) Law Rep. 3 Ch. 420.
(5) 2 J. & H. 194.

established by *Locke King's Act*, that the devisee of a mortgaged estate shall not be entitled to have the mortgage debt discharged or satisfied out of the personal or any other real estate of the testator. That was the decision in *Woolstencroft* v. *Woolstencroft* (1), where the words of the will were precisely similar to those in the present case. In *Eno* v. *Tatham* (2) it was decided that a direction (or what was equivalent to a direction) that the debts should be paid out of the testator's personal estate was such an indication of a contrary intention as to exclude the Act. Those two cases, being decisions, the one of the Lord Chancellor, the other of the Lords Justices, are of equal authority, and it is my duty, if possible, to reconcile them. I think that the distinction suggested by Vice-Chancellor *Wood* in *Pembrooke* v. *Friend* (3) enables me to do so. There the testator had directed that all his just debts should be paid as soon as might be after his decease: and the Vice-Chancellor says: "The direction for payment of debts does not in any way conflict with the Act, which merely enacts that, in effecting such payment, the assets shall be applied in a particular way. The testator does not say that the debts are to be paid out of his personal estate or by his executors. Had he used the words "by my executors," there would have been something on which to build the conclusion that he meant to express an intention that the general statutory rule should not apply." The distinction is this: that where a testator directs his debts to be paid out of some particular fund or property, or description of property, out of which, according to the rule established by the statute, they would not be primarily payable, he must be taken to signify an intention to exclude the statutory rule; but where he merely directs his debts to be paid, or to be paid out of his estate generally, he does not signify an intention to exclude that rule. I must, therefore, in construing the wills of testators who have died between the 31st of December, 1854, and the 1st of January, 1868, follow *Woolstencroft* v. *Woolstencroft*, or *Eno* v. *Tatham*, according as the words of the will in each particular come within the exact authority of one or other of those decisions. Here *Woolstencroft* v. *Woolstencroft* is exactly in point, and I must accordingly

(1) 2 D. F. & J. 347. (2) 32 L. J. (Ch.) 311.
(3) 1 J. & H. 132.

M. R. 1868 BROWNSON v. LAWRANCE.

hold that, as between the mortgaged estates and the testator's other estates, the mortgaged estates are primarily liable to the payment of the mortgage debts. As regards the second point raised in behalf of the specific devisee, I should like to consider the case further.

Mar. 10. LORD ROMILLY, M.R. :—

The remaining question in this case, upon which I reserved my decision, is this:—There are two estates comprised in the same mortgage, and the mortgagor has specifically devised one of them, leaving the other to pass by the residuary devise contained in his will; and the question is, whether, as between those two properties, *Locke King's Act* applies, which enacts that unless the testator has, by his will, signified any contrary or other intention, the mortgaged property shall, as between the different persons claiming through or under him, be primarily liable to the payment of the mortgage debt, "every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof." I am of opinion that, as between these two estates, the Act does not apply, and that the fact of the testator having specifically devised part of the mortgaged estate, and left the other part to pass by the general residuary gift, is of itself an expression of his intention that the part which passes by the residuary gift shall be primarily liable to the payment of the whole of the mortgage debt in exoneration of the part which is specifically devised.

Solicitor for the Applicant: Mr. *Tyrrell.*
Solicitors for the Plaintiffs: Messrs. *Norris & Allen.*

WALDON *v.* THOMPSON.

M. R.
1868
May 7.

Practice—Joint Solicitors with Common Agent.

MR. *W. Barber* asked that the Record and Writ Clerk might be ordered to file a bill by two Plaintiffs with an indorsement stating it to be filed by a firm of *London* solicitors, as agents for two country solicitors, not in partnership, joint solicitors for the Plaintiffs. He stated that there was a difference of opinion between the Record and Writ Clerks as to the practice, and cited in support of his application *Braithwaite's* Practice (1), and Forms to *Daniell's* Chancery Practice (2).

LORD ROMILLY, M.R., made the order.

Solicitors: Messrs. *Meredith, Lucas, & Meredith.*

PAGET *v.* GRENFELL.

M. R.
1868
May 4, 5, 7.

Double Portions—Satisfaction—Covenant to pay Annuity—Gift of Annuity by Will—Direction to pay Debts.

Upon the marriage of Mrs. *P.* one of the two daughters of *G.*, the father covenanted with the trustees of the marriage settlement to pay to them the principal sum of £12,000, with interest until payment, and also an annuity of £300 during the life of Mrs. *P.*, upon trust for her, for her separate use, without power of anticipation. *G.* subsequently in his lifetime advanced his other daughter *L.* the like principal sum of £12,000. By his will *G.* charged his real estate with an annuity of £400 in favour of Mrs. *P.*, for her separate use, and with an annuity of £1000 in favour of *L.*, and in the event of the failure of certain limitations he charged the same real estate with two additional annuities of £1500 each, in favour of Mrs. *P.* and *L.*, and he devised the estates charged with these four annuities in manner therein mentioned, and bequeathed his residuary personal estate subject to the payment of his debts upon the trusts therein mentioned:—

Held, that, having regard to the general tone of the will, and particularly to the direction for the payment of debts, Mrs. *P.* was entitled to the annuity of £400 in addition to that of £300 covenanted to be paid by the testator.

THIS was a special case.

By an indenture dated the 25th of November, 1856, being the

(1) Page 9. (2) No. 6 a.

M. R. 1868 PAGET v. GRENFELL.

settlement made on the marriage of the Plaintiff *Maria Georgiana Paget*, then *Maria Georgiana Grenfell*, spinster, with *Frederick Paget* (since deceased), *Charles Pascoe Grenfell*, the Plaintiff's father, covenanted that he in his lifetime, or his heirs, executors, or administrators, within six calendar months next after his death, would pay to the trustees of the settlement the sum of £12,000, and also the yearly sum of £500 for interest of the said sum of £12,000 until payment thereof; and it was thereby agreed that such £500, and the annual produce of the investments of the £12,000 when paid, should be paid to *Frederick Paget* and his assigns during his life, and after his death to the Plaintiff during her life; and after the death of the survivor the £12,000 and the investments thereof were to be held upon certain trusts for the children and issue of the marriage. And the said *Charles Pascoe Grenfell* thereby also covenanted during the life of the Plaintiff to pay to the trustees of the settlement an annuity of £300 by equal quarterly payments, and the trustees were to stand possessed of such annuity upon trust to pay the same to the Plaintiff for her separate use without power of anticipation.

Of the sum of £12,000 thus covenanted to be paid, £2000 belonged to the Plaintiff, but was in her father's hands.

Mr. *Charles Pascoe Grenfell* had a second daughter, *Louisa*, also entitled to £2000 in his hands. Previously to the date of his will, he presented this daughter with a sum of £10,000, so that both daughters were thus placed on a footing of equality as regards advances made by Mr. *Grenfell* in his lifetime.

By his will Mr. *Grenfell* devised all his real estates whatsoever to the use that his daughter *Louisa* should receive and take thereout the annual sum of £1000; and that the Plaintiff should, during her life, receive and take thereout the annual sum of £400 for her separate use, independent of her then present or any future husband, the said annual sums of £1000 and £400 to be paid quarterly, free of legacy duty; and he gave to his daughters the usual powers of distress and entry for recovering their respective annuities; and, subject thereto, he devised all his said real estates to his grandsons therein named successively for life, with successive remainders to their first and other sons in tail male, with remainder to the use that the Plaintiff should during her life receive and

take out of the said real estates the annual sum of £1500 in addition to the annual sum of £400 before provided for her, and for her separate use, and that his daughter *Louisa* should during her life receive and take out of the said real estates the annual sum of £1500 in addition to the annual sum of £1000 before provided for her, the last-mentioned annuities to be paid quarterly, free of legacy duty, and subject thereto the said testator devised the said real estates, "charged with the four several annuities to his daughters," to the use of his son *Henry Riversdale Grenfell* for life, with remainder to the use of his first and other sons successively in tail male, with divers remainders over. And after directing the trustees and executors of his will immediately after his death to set apart out of his personal estate a sum of £20,000, to be held upon the trusts therein mentioned, as to the residue of his personal estate, subject to the payment of his debts, funeral and testamentary expenses, and legacies, he bequeathed the same to his trustees upon trust to invest the same in the purchase of real estate, to be settled when purchased to the uses thereinbefore limited of and concerning the real estate thereinbefore devised, but so as not to multiply charges.

Frederick Paget died on the 4th of January, 1866; *Charles Pascoe Grenfell* on the 21st of March, 1867.

The questions for the Court were:—First: Whether the annuity of £400 given to the Plaintiff by the will of her father was in addition to or substitution for the annuity of £300 covenanted to be paid to her by him by the settlement of the 25th of November, 1856. Secondly: How the costs of the special case were to be borne.

Mr. *Jessel*, Q.C., and Mr. *Charles Hall*, for the Plaintiff:—

The annuity given by the will is in addition to that given by the settlement. There are considerable differences between the annuity covenanted to be paid by the settlement and that given by the will. The Plaintiff is restrained from anticipating the former, but not the latter; the former is to be paid to trustees, the latter to the Plaintiff herself; the former is not charged on real estate, the latter is.

The covenant created a debt due from the testator, and the personalty is given subject to the payment of debts. That circum-

M. R. 1868 PAGET v. GRENFELL.

stance was much relied on in *Lord Chichester* v. *Coventry* (1); *McCarogher* v. *Whieldon* (2); *Pinchin* v. *Simms* (3); *Cole* v. *Willard* (4); *Glover* v. *Hartcup* (5); *Hassell* v. *Hawkins* (6); and these cases were referred to without disapprobation in *Dawson* v. *Dawson* (7). Again, if the gift made by the will is to be taken as a satisfaction of the covenant, it must be presumed that the testator intended to raise a case of election; but the Plaintiff is not in a position to elect, for she is by the settlement restrained from anticipating the annuity of £300, and to that settlement the testator was a party, and he must be taken to have known its contents when he made his will. He cannot, therefore, be presumed to have intended to make the Plaintiff give up what he knew she could not give up: *Robinson* v. *Wheelwright* (8).

The whole conduct of the testator to his children shews that he intended to put them approximately on a footing of equality. If the annuity given by the will is not to be taken in addition to that covenanted to be paid by the settlement, great inequality will be the result, and the Court will not, under these circumstances, enforce a rule originally introduced to prevent inequality.

Mr. *Robson*, for the trustees of the marriage settlement.

Mr. *Southgate*, Q.C., and Mr. *Fischer*, for the trustees and executors of the will of *Charles Pascoe Grenfell*:—

The gift by the will must be taken to be in satisfaction of the covenant. If not, the rule against double portions may be said to be abolished.

It was laid down by Lord Justice *Turner* in *Coventry* v. *Lord Chichester* (9), that slight differences between the gifts would not prevent the operation of the rule, and his opinion was affirmed by the House of Lords. It has been expressly decided that the fact of one of the gifts only being subject to a restraint on anticipation is not sufficient for this purpose: *Weall* v. *Rice* (10).

A mere bequest of personalty, subject to the payment of debts,

(1) Law Rep. 2 H. L. 71.
(2) Ibid. 3 Eq. 236.
(3) 30 Beav. 119.
(4) 25 Ibid. 568.
(5) 34 Ibid. 74.
(6) 4 Drew. 468.
(7) Law Rep. 4 Eq. 504.
(8) 6 D. M. & G. 535.
(9) 2 D. J. & S. 343.
(10) 2 Russ. & My. 251.

is not sufficient to rebut the presumption against double portions. In all the cases there has been something more than that. Thus in *Glover* v. *Hartcup* (1) there was an express trust for payment of debts out of real and personal estate, and also an express direction that the gift was to be in satisfaction of dower and thirds; the maxim "*Expressio unius, est exclusio alterius*" therefore applied. In *Lord Chichester* v. *Coventry* (2) there was an express trust for payment of debts out of real and personal estate. In *Wathen* v. *Smith* (3) a direction for payment of debts was not considered material.

As to the annuity of £300 being subject to a restraint on anticipation, if the Plaintiff elects to take the annuity of £400 she must take £300, part of it, on the same terms.

It is impossible, under the circumstances of this case, to say that the intention of the testator was to put his daughters on a footing of equality.

Mr. *Jessel*, in reply.

May 7. LORD ROMILLY, M.R.:—

After carefully considering this will I have come to the conclusion that the testator intended to give the annuity of £400 in addition to that of £300 covenanted to be paid by the settlement. I am very much guided by the tone of the whole will, which speaks of the four annuities given as subsisting, and I also go upon the express direction which it contains for the payment of debts. Lord Justice *Turner* thought that such a direction was a material circumstance in *Coventry* v. *Lord Chichester* (4), and so did the House of Lords (2), and that view has been acted on in other cases. This annuity of £300 was the testator's debt which he was bound to pay, and it must be paid accordingly. I must, therefore, answer the questions by saying that the annuity of £400 was given in addition to that of £300 secured by the settlement, and the costs must come out of the testator's estate.

Solicitors: Messrs. *R. M. & F. Lowe;* Mr. *W. Leman.*

(1) 34 Beav. 74.
(2) Law Rep. 2 H. L. 71.
(3) 4 Madd. 325.
(4) 2 D. J. & S. 343.

M. R.

1868

May 2, 4.

In re GRABOWSKI'S SETTLEMENT.

Appropriation of Payment—Proof against Estate of defaulting Trustee for principal Trust Fund and Arrears of Interest—Appropriation of Moneys recovered as between Capital and Income.

Eq 343, -4
2 Ch D 652

Where a trustee made away with a trust fund, and after his death new trustees proved against his estate in an administration suit for the aggregate amount of the principal trust fund and the arrears of interest thereon, and recovered a sum less in amount than the principal of the trust fund:—

Held, that the moneys recovered from the estate were to be attributed to capital, but that the future income thereof ought to be paid to the tenant for life.

BY a settlement made in 1843, certain sums of stock and chattels were settled upon trust for the separate use of the Countess *Grabowski* for life, and after her death upon such trusts as she should by will appoint, and in default of appointment in trust for her children.

In April, 1853, *Alfred Brodie* was the sole surviving trustee of the settlement, and the trust fund was then of the value of £6985 19*s.* 7*d.* *Brodie* subsequently made away with the whole of the trust fund, except £272 4*s.* 8*d.*; but he made occasional payments, amounting to £600, to the Countess in respect of the income. He died in 1857, and a suit was instituted for the administration of his estate, in which a decree was made on the 10th of December, 1865. New trustees of the settlement were appointed; they brought in a claim in the suit against *Brodie's* estate for £9730 9*s.* 6*d.*, in respect of the trust fund of £6985 19*s.* 7*d.*, and £3636 4*s.* for interest thereon up to the date of the decree, after deducting the £272 4*s.* 8*d.* and £19 9*s.* 5*d.* interest thereon, and the £600 paid by *Brodie* on account of income; and by the Chief Clerk's certificate, made in January, 1868, the claim was allowed as a debt of £9730 9*s.* 6*d.*, with interest from the date of the decree. In March, 1868, the trustees received £502 from *Brodie's* estate in part satisfaction of their debt, and, after deducting their costs, they paid the balance into Court under the *Trustee Relief Act*.

The Countess now presented a Petition that the fund in Court might be paid to her, as representing arrears of income of the trust fund.

Mr. *Martineau*, for the Petitioner:—

I cannot contend that the Petitioner is entitled to the whole of the fund, but it must be apportioned between the capital of the settled trust fund and the arrears of income, in the proportions of the amounts of capital and income which made up the total debt for which the trustees proved against *Brodie's* estate. The arrears of income were as much a debt from that estate as the capital, and the two debts might have been proved separately. In *Maclaren* v. *Stainton* (1) it was held that the profit accruing to a testator's estate by a successful compromise of a claim made against it must be apportioned between capital and income, and *pari ratione* the loss to this trust estate by the default of the trustee should be apportioned.

Mr. *Hemming*, for the Petitioner's children and the trustees:—

The whole of the fund in Court must be attributed to capital. Of the two debts due from *Brodie's* estate, the debt for principal was the prior in date, and the payments made by the estate must be attributed to it in the first instance. The fund should be accumulated until the whole principal is made good before the tenant for life takes anything.

May 4. LORD ROMILLY, M.R.:—

I think there can be no apportionment of the money recovered from the estate of the defaulting trustee, but that it must be treated as capital until the whole of the capital has been replaced. The Petitioner, however, is entitled to the interest of the fund in Court, though not to any part of the fund itself.

Solicitors: Messrs. *Walker & Martineau.*

(1) Law Rep. 4 Eq. 448.

M. R.
1868
April 27.

EYTON *v.* DENBIGH, RUTHIN, AND CORWEN RAILWAY COMPANY.

Railway Company—Rent-charge—Power of Distress—Receiver—Leave to distrain—Lands Clauses Act, 1845, *s.* 11.

Where land had been conveyed to a railway company in consideration of a rent-charge, and the deed gave the person entitled to the rent-charge a power to distrain on the land for arrears of the rent-charge, the Court gave the owner of the rent-charge leave to distrain on the land, notwithstanding the appointment of a receiver of the tolls, profits, and income of the undertaking of the company in a suit instituted by the owner of a similar rent-charge on behalf of himself and all the other owners of similar rent-charges who should come in and contribute to the expenses of the suit.

In 1861 *John Price* sold and conveyed lands to the *Denbigh, Ruthin, and Corwen Railway Company*, for the purposes of their special Act, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated, in consideration of an annual rent-charge of £72, payable half-yearly, and by the deed of conveyance a power was reserved to the person or persons for the time being entitled to the rent-charge, to enter upon the lands conveyed, or any other lands for the time being belonging to the company, and the buildings for the time being thereon, and to distrain for the rent whenever it should be in arrear.

The company made several other purchases of land in consideration of rent-charges.

In April, 1867, the company being unable to pay the rent-charges, *Mary Eyton*, the owner of one of the rent-charges, instituted this suit, on behalf of herself and all other persons entitled to rent-charges created in respect of purchases of land by the company who should come in and contribute to the expense of the suit, against the company, and certain debenture-holders and judgment creditors of the company, for the payment of the rent-charges, and for the appointment of a receiver.

On the 18th of April, 1867, an order was made appointing a receiver of the tolls and the profits and income arising upon or out of the undertaking of the company, and in January, 1868, the decree in the cause was made, by which the appointment of the

receiver was continued, and an inquiry was directed what rent-charges had been granted by the company; what property was liable to such rent-charges respectively; what other incumbrances affected such property; and what were the respective priorities of such incumbrances, including the said rent-charges.

An application was now made, by summons adjourned from Chambers, on behalf of *Price* for leave to distrain on the land conveyed by him to the company for a half-year's rent which become due on the 30th of November, 1867, and for the costs of the application, and all other expenses incidental to such distress.

A station had been built upon part of the land conveyed by *Price*.

Mr. *Jessel*, Q.C., and Mr. *Methold*, for the applicant:—

The 11th section of the *Lands Clauses Act*, 1845 (1), provides that rent-charges reserved by conveyances of land to the company shall be charged on the tolls or rates payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties. Here the parties have agreed that the applicant's rent-charge shall be secured by a power to distrain on the land conveyed, but by reason of the appointment of a receiver in this suit the applicant cannot exercise his power without the leave of the Court. The applicant is an entire stranger to the suit, and the Court will not allow him to be deprived of his

(1) The 10th and 11th sections of the *Lands Clauses Act*, 1845, are as follows:—

Sect. 10. "It shall be lawful for any person seised in fee of, or entitled to dispose of absolutely for his own benefit, any lands authorized to be purchased for the purposes of the special Act, to sell and convey such lands, or any part thereof, unto the promoters of the undertaking in consideration of an annual rent-charge payable by the promoters of the undertaking." . . . . .

Sect. 11. "The yearly rents reserved by any such conveyance shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such rents become payable; and if at any time any such rents be not paid within thirty days after they so become payable, and after demand thereof in writing, the person to whom any such rents shall be payable may either recover the same from the promoters of the undertaking, with costs of suit, by action of debt in any of the superior Courts, or it shall be lawful for him to levy the same by distress of the goods and chattels of the promoters of the undertaking."

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security by the appointment of the receiver: In *Bowen* v. *Brecon Railway Company* (1) a debenture-holder, by reason of the peculiar nature of his security, which merely gave him a right to be paid out of the tolls *pari passu* with all the other debenture-holders, was not allowed to sue out execution on a judgment for his own benefit after a suit had been instituted on behalf of all the debenture-holders; but that rule does not apply to a judgment creditor: *Russell* v. *East Anglian Railway Company* (2); *Potts* v. *Warwick Canal Company* (3); still less can it apply to the owner of a rent-charge with an express power of distress.

Mr. *Baggallay*, Q.C., and Mr. *Bradford*, for the Plaintiff:—

The 11th section of the Act, by enacting that these rent-charges shall be charged on the rates and giving to all the holders of them the remedy of distress of the goods and chattels of the company, implies that no rent-charge shall be specially charged on any particular land, and that all the holders of rent-charges shall have equal rights; the principle, therefore, of *Bowen* v. *Brecon Railway Company* applies to this case, and the power of distress reserved by the applicant's conveyance, which enables him to gain a preference over the other holders of rent-charges, is contrary to the spirit if not to the letter of the Act, and he ought not to be allowed to exercise it to their prejudice: *Fairtitle* v. *Gilbert* (4). If every rent-chargee is allowed to distrain on the land sold by him the railway will be unworkable, and the securities of all the rent-chargees, debenture-holders, and creditors, will be valueless. We therefore submit, that either the application should be refused or the applicant should only be allowed to distrain as a trustee for himself and all the other holders of rent-charges.

Mr. *Dryden*, for the company.

LORD ROMILLY, M.R.:—

I am clearly of opinion that I must give the applicant leave to distrain. I cannot alter the Act of Parliament. The receiver

(1) Law Rep. 3 Eq. 541.
(2) 3 Mac. & G. 125.
(3) Kay, 142.
(4) 2 T. R. 169.

was not appointed for the purpose of keeping persons out of their rights, and in making this order I express no opinion as to the legal rights of the applicant, but simply remove out of his way the difficulty of the officer of the Court being in possession. It is exactly the same case, as if a stranger to the suit was applying for leave to bring ejectment. The applicant must add his costs of this application to the account due to him. The costs of the Plaintiff and Defendants will be costs in the cause.

Solicitors for the Applicant: Messrs. *Tatham & Procter,* agents for Mr. *J. Parry Jones, Denbigh.*

Solicitors for the Plaintiff: Messrs. *Rooks, Kenrick, & Harston.*

Solicitor for the Defendants: Mr. *Noyes.*

In re CONTRACT CORPORATION.

WESTON'S CASE.

Company—Winding-up—Contributory—Past Members.

In the winding up of a joint stock company a past member who ceased to be a member within a year before the commencement of the winding-up, cannot be placed on the list of contributories until it is proved, first, that there was at the date of the winding-up order some existing debt or liability of the company contracted before he ceased to be a member; and, secondly, in the case of a limited company, that the shares formerly held by him have not been fully paid up.

THE *Contract Corporation, Limited,* a joint stock company formed and registered under the *Companies Act,* 1862, with a nominal capital of £2,000,000, in 20,000 shares of £100 each, was ordered to be wound up by the Court on the 21st of April, 1866. At the date of the winding-up £15 per share had been called up. The list of contributories who were members at the date of the winding-up, commonly called Class A., was settled, and two calls were made upon them, the first of £30 and the second of £55 per share, being the full amount of the shares.

The official liquidator now proposed to place on the list of contributories the past members of the company who had ceased to be

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members within a year before the commencement of the winding-up, commonly called Class B, and accordingly he gave notice to *Edward Weston*, who had held 100 shares, and had transferred them eight months before the winding-up, that a day had been appointed for proceeding with the settlement of the list, and that his name was included in Class B as a contributory for 100 shares. The matter was adjourned into Court.

The liquidator, in an affidavit made on the 24th of March, 1868, stated that he had received, in respect of calls from contributories of Class A, £156,899 5*s.* 8*d.*; that he believed he should not ultimately obtain from Class A more than the further sum of £100,000; that the assets of the company already realized had produced £16,625 11*s.* 3*d.*, and he believed the remaining assets would not produce more than £60,000; that the claims admitted against the company amounted to £675,277 19*s.*; that he believed claims to the amount of £350,000 would ultimately be made against the company in respect of letters of indemnity; and that there were other outstanding claims of which he believed that £50,000 would be admitted.

Mr. *Baggallay*, Q.C., and Mr. *Chitty*, for the official liquidator:—

The *Companies Act*, 1862, sect. 98, requires the Court to settle the list of contributories as soon as may be after making the winding-up order, and neither that section nor the Orders and Rules of the Court under the Act make any distinction between present and past members of the company. By the 38th and 74th sections of the Act, past members are contributories subject to the qualifications specified in the 38th section, and in *Andrew's Case* (1) Lord Justice *Rolt* was of opinion that the list of past members should be settled as soon as may be after the winding-up order, and that persons placed on the list as past members would not be thereby deprived of the benefit of the qualifications in the 38th section, if, when a call was made, they could shew that they were entitled to the benefit of them. It is clear, from the evidence of the official liquidator, that the debts of this company cannot be satisfied by calls on the present members; we submit, therefore, that the Court should now proceed to place on the list those who were members within a year before

(1) Law Rep. 3 Ch. 161.

the winding-up, leaving it to each individual contributory, if and when a call is made upon him, to dispute his liability. The 102nd section of the Act empowers the Court to make calls upon all or any of the contributories settled on the list, so that the fact of a person's name being placed on the list does not necessarily entail the consequence of having a call made upon him.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for *Weston*:—

No past member can be placed on the list until it is ascertained that the present members cannot pay the full amount of the calls made on them: *Needham's Case* (1). In *Andrew's Case* (2) it was admitted that the present members were unable to pay the calls, and also that there were existing debts contracted before any of the past members had transferred their shares, and consequently an order was made, and was affirmed on appeal, to settle the list of past members. The observations of Lord Justice *Rolt* in that case, which have been relied on by the other side, were mere *dicta*, and in another part of his judgment he said that it would be open to any person whom it was proposed to place on the list as a past member to shew that no debt then existed which had been contracted while he was a member, and consequently that he ought not to be put on the list. We submit that the liquidator is bound to shew that some debt now exists which was contracted while the respondent was a member.

LORD ROMILLY, M.R.:—

Before I can place a past member on the list I must have evidence, in each individual case, that at the date of the winding-up order there was some debt of the company which was due when he transferred his shares, and also that the person to whom he transferred his shares has not paid up the full amount of the shares; both of these conditions are necessary to make him a contributory under the 38th section. In the case of *Barned's Bank* (3) there were debts due when the company was formed which exceeded the total amount of the assets, including all the calls upon the shares. The matter must stand over for further evidence.

(1) Law Rep. 4 Eq. 135. (2) Law Rep. 4 Eq. 458; 3 Ch. 161.
(3) Law Rep. 4 Eq. 458.

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Let the official liquidator pick out from the books the particu debts upon which he relies, and shew them to Mr. *Weston's* licitors.

Solicitors for the Official Liquidator: Messrs. *Linklaters, Ho wood, & Addison.*

Solicitor for *Weston:* Mr. *H. Harris.*

M. R. 1868 — *April* 24.

ROBERTS *v.* HUGHES.

Mortgage—Practice—Disclaimer—Costs—Foreclosure Suit—Equitable Mort agreed to be transferred before Suit.

2 Ch. D. 211

A first mortgagee having notice that *A.*, a second mortgagee, had agr for valuable consideration, to transfer his mortgage to *B.*, but had not cuted a transfer, made *A.* a Defendant to a foreclosure suit. Before pearing, and again immediately after appearing, *A.* told the Plaintiff tha had no interest in the property, and offered to disclaim, and, being se with interrogatories, he put in an answer and disclaimer. Afterward executed a transfer of his mortgage to *B.*, and the Plaintiff then offere dismiss the bill against him without costs:—

Held, that *A.*, until he executed the transfer, was a necessary party, that he was not entitled to his costs.

THIS was a foreclosure suit, in which the only question was, w ther the bill should be dismissed with or without costs as agai one of the Defendants, *Griffith Evans*, under the following circu stances:—

The Defendant *Evans* was a second mortgagee of the prope of which the Plaintiff was first mortgagee. In 1866 he brought action against *Marcus Louis*, the solicitor whom he had emplo in the transaction, for negligence in having invested his money an insufficient security, and on the 31st of July, 1866, the act was compromised on the terms that *Louis* should pay *Evans* £ and his costs, and that *Evans* should assign his mortgage to *Lou Louis's* expense, if required. The £250 was paid on the same d and on the following day the Plaintiff in this suit, who had b summoned as a witness in the action, was informed of the te of compromise and of the payment of the £250.

On the 3rd of September, 1866, the Plaintiff, having ascertai

that *Evans* had not executed a transfer of his mortgage to *Louis*, filed his bill against the mortgagor and *Evans*. On the 11th *Evans'* solicitors, having been served with a copy of the bill, wrote to the Plaintiff's solicitors as follows:—

"With respect to the Defendant *Evans*, we have to inform you that we have lately proceeded in an action against *Marcus Louis* with respect to the second mortgage on the property mentioned in the bill. This action resulted in *Louis* being obliged to pay the full amount of *Evans'* mortgage, and he thereupon became entitled, at his own expense, to a transfer. *Evans'* position, therefore, is that he has now no interest in the property, and he is willing to disclaim, and under these circumstances we suggest the propriety of your applying to Mr. *Marcus Louis*."

On the 18th *Evans'* solicitors entered an appearance for him, and on the same day they wrote to the Plaintiff's solicitors that they were still ready and intended to disclaim.

The Plaintiff served *Evans* with interrogatories, and on the 29th of November, 1866, he put in an answer and disclaimer, in which he stated the facts above-mentioned, and stated that he had not yet executed any assignment of the mortgage, because *Louis* had not required it, and that under the circumstances he did not claim, and never had claimed since the filing of the bill, any charge upon, or interest in, the mortgaged property.

In December, 1866, *Evans* executed a transfer of his mortgage to *Louis*, and in March, 1867, his solicitors gave notice of the transfer to the Plaintiff's solicitors. The Plaintiff subsequently amended his bill by making *Louis* a Defendant, and offered to dismiss the bill as against *Evans* without costs; but the offer was declined.

Mr. *Jessel*, Q.C., and Mr. *Andrew Thomson*, for the Plaintiff:—

The Defendant *Evans* is not entitled to his costs. When the bill was filed he had a mortgage of the property which he did not transfer till after the answer, and, even upon the terms of his agreement with *Louis*, he had a lien upon the mortgage for his costs in the action. The letters of his solicitor did not amount to a disclaimer, and would not have precluded him from redeeming the Plaintiff. The Plaintiff was not bound before filing his bill to ask

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the Defendant to disclaim: *Ford* v. *Earl of Chesterfield* (1). A disclaiming Defendant is not entitled to his subsequent costs, unless he also offers to have the bill dismissed against him without costs: *Talbot* v. *Kemshead* (2); *Maxwell* v. *Wightwick* (3).

Mr. *Baggallay*, Q.C., and Mr. *A. E. Miller*, for *Evans*:—

Evans never had any legal estate in the property, and he had parted with his equitable interest before the filing of the bill. From the 31st of July, 1866, when the terms of compromise were signed and the £250 paid by *Louis*, the mortgage became the property of *Louis*, without the necessity for a formal assignment by deed. If *Evans* had any claim upon the mortgage for his costs of the action, the notice of disclaimer given by his solicitors was sufficient to get rid of such claim; and as that notice was given before he had incurred any costs in the suit, he is entitled to his costs: *Howkins* v. *Bennett* (4).

Mr. *Langworthy*, for *Louis*.

LORD ROMILLY, M.R.:—

I think the Defendant *Evans* must pay his own costs. All the authorities are, in my opinion, against him. His statement that he had agreed to assign his mortgage and had been paid £250, and that, under the circumstances, he had no interest in the property, did not amount to a disclaimer. He might afterwards have turned round and said, "I forgot the costs," and until he executed an assignment of the mortgage he could have filed a bill to redeem the Plaintiff. If he had told the Plaintiff he was about to execute an assignment, and requested him to postpone filing the bill for a short time until it could be executed, he need not have been made a party, and all the expense would have been saved.

Solicitor for the Plaintiff: Mr. *S. C. Frankish*.

Solicitors for the Defendants: Messrs. *Rooks, Kenrick, & Harston*; Mr. *Louis*.

(1) 16 Beav. 516.
(2) 4 K. & J. 93.
(3) Law Rep. 3 Eq. 210.
(4) 2 H. & M. 567, n.

WESTON *v.* EMPIRE ASSURANCE CORPORATION.

M. R.
1868
May 1.

Practice—Pleading—Evidence—Surprise—Inquiry—Notice—General Allegation —Evidence of Particular Fact.

In a cause where replication is filed, if the question turns upon a particular matter of fact not specifically alleged in the pleadings, the Court will not give the Defendant leave to put in further evidence after the evidence is closed, but will at the hearing direct an inquiry as to such fact.

Where the Plaintiff's right to relief depended on the fact of the Defendant having had notice of a mortgage, and the bill alleged generally that the Defendant had express notice, and the answer generally denied notice, and the Plaintiff filed replication, and gave evidence that on a particular occasion a written notice of the mortgage was given with other documents to the Defendant's agent, a motion by the Defendant after the evidence was closed for leave to put in further evidence was refused, but at the hearing an inquiry was directed, on the ground of surprise, whether or not he had notice of the mortgage.

In October, 1865, *Samuel Boonham* mortgaged a leasehold house to the *Friend-in-Need Assurance Company.*

On the 12th of March, 1866, *Boonham* gave the Plaintiffs a memorandum in writing charging the same property, subject to the prior mortgage, with £100, and on the same day the Plaintiffs gave to the manager of the *Friend-in-Need Company* a written notice of their charge.

In August, 1866, the *Friend-in-Need Company* was amalgamated with the *Empire Assurance Corporation*, and *Boonham's* mortgage was transferred, and the title deeds of the mortgaged property were delivered, to the corporation. In October, 1866, *Boonham* paid off the amount due on the mortgage of October, 1865, and the corporation, without the knowledge of the Plaintiffs, re-assigned the property, and gave up the title deeds to him, and he sold and assigned the property to a purchaser without notice of the Plaintiffs' charge, and shortly afterwards became insolvent.

The Plaintiffs thereupon instituted this suit against the corporation, praying that under these circumstances the corporation might be declared liable in equity to pay the amount due on the Plaintiffs' charge, and for an account and payment accordingly.

The bill alleged that on the occasion of the amalgamation all

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the assets and liabilities of the *Friend-in-Need Company* were duly transferred to and vested in the Defendant company, and that the Defendant company received express notice of the Plaintiffs' charge.

The Defendants, by their answer, denied that they received express or any other notice whatever of the Plaintiffs' charge, and stated that no information relating thereto was at any time before the re-assignment of the premises to *Boonham* communicated to them, or their solicitor, or any of their officers or agents. The Plaintiffs filed replication, and put in evidence an affidavit by the manager of the *Friend-in-Need Company*, who stated that on the receipt of the notice of the Plaintiffs' charge he placed it among the deeds relating to the mortgaged premises, and on the amalgamation he handed the notice, with the other deeds, to the secretary of the corporation, their solicitor being present.

After the filing of the evidence the Defendants moved for leave to put in further evidence rebutting the manager's evidence, on the ground that it was a surprise upon them, but the motion was refused.

The cause now came on for hearing.

Mr. *Southgate*, Q.C., and Mr. *Waller*, for the Plaintiffs.

Mr. *Jessel*, Q.C., and Mr. *Brooksbank*, for the Defendants, admitted their liability if they had notice of the Plaintiffs' charge, but contended that as the bill merely contained a general allegation that they had express notice, and the Plaintiffs had put in evidence of a specific act of notice, to which evidence they had no opportunity of replying, either they ought to be allowed to call their secretary and solicitor as witnesses to contradict the testimony of the manager of the *Friend-in-Need Company*, or an inquiry should be directed, whether they had notice of the Plaintiffs' charge.

LORD ROMILLY, M.R.:—

In a cause where replication is filed, and the Defendant has consequently no opportunity of answering the Plaintiff's evidence, if the question turns on a particular fact which was not alleged by the bill, I never make a decree without directing an inquiry as to

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the particular fact. Here the bill contained a general allegation of express notice, and the Defendants, by their answer, generally denied notice; and upon that the Plaintiffs should have either amended the bill by specifying the particular form or mode of notice which they alleged to have been given, or else brought on the cause upon motion for decree, according to the modern practice, which was introduced for the purpose of preventing surprises of this kind. I think that the Plaintiffs have made out a *primâ facie* case, but that the Defendants are entitled to have the opportunity of disproving, if they can, the particular act of notice of which the Plaintiffs have given evidence without specially alleging it in their bill. I shall, therefore, direct an inquiry whether the Defendants had or had not notice of the Plaintiffs' charge, and if they had notice there must be an account of what is due to the Plaintiffs on their security; further consideration must be reserved.

Solicitors for the Plaintiffs: Messrs. *Dawson, Bryan, & Dawson.*
Solicitor for the Defendant: Mr. *Pulbrook.*

BROOKE *v.* HAYMES.

M. R.
1868
April 30.

Recital—Mistake—Estoppel—Executor of Executor—Renunciation.

A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part.

Where, therefore, a deed of release and indemnity to the executor of a testator contained a recital to the effect that out of the testator's residuary estate the executor had retained the sum of £19 8*s.*, being the amount of the legacy duty on the bequests contained in the will, and in fact the sum so mentioned was only part of such legacy duty:—

Held, that the executor, who was afterwards called on to pay the balance of the duty, was not precluded from recovering such amount from the estates of the residuary legatees under the covenant for indemnity in the deed.

An executor of an executor who has accepted the executorship of the latter testator cannot renounce the executorship of the former.

THOMAS GOODE, by his will, dated the 28th of February, 1838, gave his residuary real and personal estate to *Thomas*

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Rhodes, *Benjamin Pitt*, and *William Henry Brooke* (the Plaintiff) upon trusts for sale, conversion, and investment; and out of the interest of such investments he directed them to pay certain annuities; and then to pay one-third of the residue of such interest to his mother, *Catherine Goode*, for her life, one-third to his sister, *Mary Goode*, for her life, and one-third to his brother, *William Goode*, for his life; and after the death of his mother he gave one-third of the whole clear residue of his property to such person or persons, and generally, as his mother should by her will, but not by deed, appoint; and after the death of his sister he gave one other third of the same residue to such person or persons, and generally, as his sister by her will, but not by deed, should appoint; and the remaining third he gave to such person and persons, and generally, as his brother by his will, but not by deed, should appoint; and the testator appointed *Rhodes*, *Pitt*, and *Brooke* executors of that his will.

The testator died in April, 1838, leaving the said *Catherine*, *Mary*, and *William Goode* his sole next of kin. *Rhodes* and the Plaintiff alone proved and acted in the trusts of the testator's will.

In 1841 *William Goode* filed a bill for the administration of the testator's estate. This suit was terminated by an agreement entered into between *William Goode*, *Catherine Goode*, *Mary Goode*, the annuitants under the will of the testator, and the trustees. The agreement contained the following amongst other terms:— That the legacy duty, if any remaining to be paid, should be borne by the legatees and annuitants whose shares or interests were or might be respectively subject thereto, and that the trustees should retain the same out of such shares or interest; that certain sums should be paid to the annuitants in satisfaction of their annuities; that, after making such payments, the clear residue of the testator's estate should be equally divided between, and paid and transferred to *Catherine Goode*, *Mary Goode*, and *William Goode*; and that the bill filed by *William Goode* should be dismissed.

In order to carry this agreement into effect an indenture was executed, bearing date the 9th of December, 1841, and made between *Catherine*, *Mary*, and *William Goode* of the first part, the annuitants of the second part, and *Rhodes* and *Brooke* of the third part. It contained recitals (amongst others) to the effect that

Rhodes and *Brooke* had paid and satisfied all the testator's debts, so far as the same came to their knowledge, and also his funeral and testamentary expenses, and the several pecuniary and specific legacies bequeathed by his will; that the above-mentioned suit had been instituted, and the above-mentioned agreement entered into, for the purpose of preventing further litigation; that *Rhodes* and *Brooke* had, in pursuance of the said agreement, made certain payments therein particularly mentioned out of the residuary estate of the testator, and had retained thereout "the sum of £19 8*s*., being the amount of legacy duty payable upon the several bequests contained in the said will, and to be applied by them accordingly," and had transferred and paid the residue of such estate to the said *Catherine*, *Mary*, and *William Goode* in manner therein particularly mentioned; and after a release by the parties thereto of the first and second parts of all claims against *Rhodes* and *Brooke* in respect of their dealings with the testator's estate, the deed contained a joint and several covenant by *Catherine*, *Mary*, and *William Goode* for the payment of any sum which *Rhodes* and *Brooke* might at any time or times thereafter be called upon to pay in respect of any debt, claim, or demand which should prove to be outstanding against the estate of the testator, and to indemnify *Rhodes* and *Brooke* against any actions or legal proceedings which might be instituted against them, and also against all loss, costs and charges, damages and expenses, which they might sustain, incur, or pay for or by reason of having concurred in the aforesaid agreement, or having made such distribution or division of the testator's estate as therein mentioned.

In fact the sum of £19 8*s*. was not the whole legacy duty payable in respect of the testator's residuary estate, but only the last instalment on the life interests given by the will to *Catherine*, *Mary*, and *William Goode*. No sum was paid or retained by the executors in satisfaction of the duty payable on the *corpus* of the testator's estate. It appeared, however, that prior to the date of the deed the executors had proposed to the Stamp Office to pay such duty, but the proposal was rejected by the authorities there, on the ground that the duty then attached only to the life interests given by the will.

Mary Goode died in December, 1845, having by her will

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bequeathed her residuary personal estate to *Catherine Goode*, and appointed *Catherine Goode*, *Edward Bates*, and *Francis Franklin* her executors. *Edward Bates* and *Francis Franklin* proved the will, and acted in the trusts thereof, and, after payment of the legacies thereby given, paid the residue of the estate to *Catherine Goode*, who had renounced probate, and disclaimed the trusts of the will.

Catherine Goode died in 1847, having by her will appointed the said *Edward Bates* and *Francis Franklin* executors thereof. Both the executors proved the will of the testatrix, and they possessed themselves of her estate, and thereout paid certain legacies.

Edward Bates died in 1861, having by his will appointed the Defendants *Arthur Haymes* and *Charles Goring* executors of his will, and they proved the will, and acted in the executorship.

Francis Franklin died in 1864, having appointed the Defendants *Edward Walts* and *Ann Franklin* executor and executrix of his will, and they, in June, 1864, proved the will, and acted in the executorship of their testator. By a deed made in September, 1864, they renounced their title to probate of the will of *Francis Franklin* so far as regarded the executorship or trusteeship of the will of *Catherine Goode*, and they renounced and disclaimed the execution of the trusts of her will.

William Goode died in 1848. It was not known who were his legal personal representatives.

In 1864 the Plaintiff, *William Henry Brooke*, who had survived *Thomas Rhodes*, was called upon to pay, and accordingly did pay, the legacy duty payable on the *corpus* of the residuary estate of *Thomas Goode*. The present suit was instituted for the purpose of recovering the amount so paid from the estates of *Mary* and *Catherine Goode*.

Mr. *Jessel*, Q.C., and Mr. *Martineau*, for the Plaintiff:—

As to the duty payable in respect of the shares of *Mary* and *Catherine Goode*, if they were alive we should be entitled to bring actions against them, and recover the amount we have paid: *Hales* v. *Freeman* (1); *Bate* v. *Payne* (2); and as they are dead we have a right to file a bill against their legal personal representatives,

(1) 1 Brod. & B. 391. (2) 13 Q. B. 900.

calling on them to admit assets sufficient for the payment of our claim, and, in default, seeking administration of their estates.

As to the duty payable in respect of *William Goode's* share, we rely on the joint and several covenant of indemnity contained in the deed of the 9th of December, 1841.

Mr. *Baggallay*, Q.C., and Mr. *Chitty*, for the Defendants:—

This is a suit to enforce a purely legal right, and the Plaintiffs can recover no more than they would be entitled to recover at law. Now if the Plaintiffs had brought an action on the covenant in the deed of the 9th of December, 1841, they would clearly have been estopped from alleging that any further or other sum was due for legacy duty than the £19 8*s.* specified in it: *Bowman* v. *Taylor* (1); *Lainson* v. *Tremere* (2).

Again: the covenant in the deed was never intended to extend to a case of this description; the scope of it is limited by the introductory recital, which shews that it was intended only to provide an indemnity against any debts of the testator which might not have come to the knowledge of the executors. The amount of the legacy duty payable on their testator's estate was clearly within the knowledge of the executors.

Finally: *Edward Watts* and *Ann Franklin*, who have renounced the executorship of *Catherine Goode*, are improperly made Defendants to this suit. It has never been decided that an executor of an executor may not take upon himself the administration of the effects of the latter testator, and refuse that of the former, and there are *dicta* to the contrary: *Wangford* v. *Wangford* (3); *Hayton* v. *Wolfe* (4); *Barker* v. *Railton* (5); *Williams* on Executors (6).

LORD ROMILLY, M.R.:—

This is a very unfortunate case, but at the same time a very clear one. I cannot look upon the recitals in the release in the same way as Mr. *Baggallay* and Mr. *Chitty*. The true meaning of these recitals is this: "We have retained what is necessary for the payment of legacy duty, and all that is necessary is £19 8*s.*" That

(1) 2 A. & E. 278.
(2) 1 Ibid. 792.
(3) Freem. 520.
(4) Cro. Jac. 614.
(5) 11 L. J. (Ch.) 372.
(6) 6th Ed. vol. i. p. 265.

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was a simple mistake of fact common to all parties, and under these circumstances I am inclined to think that there would be no estoppel at law, and certainly there is none in equity. Although an executor may execute a solemn deed, saying, "I have paid all the legacy duty on certain bequests," amounting to a sum named; still, if he shews clearly that there is a mistake in the amount, and there is no fraud or deception in the case, I am of opinion that in equity he is entitled to recover any further sum which he may have been properly called upon to pay.

Then it is quite clear that the Defendants are the legal personal representatives of *Mary Goode*. There may, perhaps, be no case which expressly decides that an executor of a testator cannot renounce the executorship of other persons of whom his testator may have been executor, but I can remember that when I was at the bar the question was often raised, and the notion was always scouted. The principle is very plain that a person cannot accept one part of the duties of an executor, and refuse the rest. And if no case has been reported, it must be because every one thought the point too clear to be worth reporting.

Solicitors for the Plaintiff: Messrs. *Emmets, Watson, & Emmet*, agents for Messrs. *Sanders & Smith, Dudley.*

Solicitor for the Defendants: Mr. *B. Hunt.*

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In re ANGLO-DANUBIAN STEAM NAVIGATION AND COLLIERY COMPANY.

WALKER'S CASE.

Winding-up—Company—Contributory—Transfer of Shares—Laches by Company and Transferor—Companies Act, 1862, *s.* 35.

Although there may have been unnecessary delay on the part of a company in registering a transfer of shares, no order for the rectification of the register can be made under the 35th section of the *Companies Act*, 1862, on the application of a transferor who is also in default, after the company has been ordered to be wound up.

A shareholder in a company resisted an action for calls on the ground of alleged misrepresentations contained in the prospectus; and also brought

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an action against the promoters and directors to recover moneys previously paid in respect of the shares. Both actions were, with the sanction of the company, compromised, one term of the compromise being that the shares should be transferred to one of the directors. A transfer was accordingly executed by the shareholder and the transferee, and deposited with the attorney who acted for the company and the directors in the actions; but no further steps were taken in the matter, and two years after the company was ordered to be wound up:—

Held, that the shareholder, whose name remained on the register, was a contributory.

Fox's Case (1) distinguished.

IN July, 1862, after the registration of the *Anglo-Danubian Steam Navigation and Colliery Company, Limited*, Mr. *J. L. Walker* applied for fifty shares therein, and paid a deposit of £50 upon such application. In October of the same year the shares were allotted to him; and in November he paid the allotment-money, amounting to £75. In December a call of £2 per share was made. This *Walker* refused to pay, as he also did another call of the same amount made in August, 1863, on the ground that he had been induced to become a shareholder by fraudulent misrepresentations contained in the prospectus issued by the company.

On the 11th of June, 1863, actions were brought against *Walker* and ten other shareholders for the purpose of recovering the calls due from them. In all these actions pleas raising the issue of fraud were pleaded by the shareholders. In January, 1864, *Walker* and the other shareholders, Defendants to these actions, commenced eleven actions against Messrs. *Burke* and *Kearns*, the promoters and two of the directors of the company, and against three other directors, to recover the sums paid by them respectively upon the application for and allotment of their shares. In the latter actions the directors employed as their attorney Mr. *Devonshire*, who also acted in that capacity for the company in the actions against the shareholders. On the 8th of March, 1865, a compromise was arranged between the company and the litigant directors and shareholders, the material terms of which were, that the records in the actions by the shareholders should be withdrawn, and all imputations on the directors abandoned; that the pleas of fraud in the action by the company should also be withdrawn; that each

(1) Law Rep. 5 Eq. 118.

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of the shareholders should transfer his shares to Messrs. *Kearns* and *Burke*, or either of them; and that the transferees should bear the unpaid calls; that the shareholders should be allowed or paid a sum equivalent to one-half of the amount paid by each shareholder on his shares, and that in lieu of a taxation of the costs of *Burke* and *Kearns*, and of the company, the shareholders should pay into the hands of Mr. *Devonshire*, as the attorney of the directors and the company, a sum of £2300.

In accordance with this arrangement a sum of £1631 5*s.* was paid by the shareholders to Mr. *Devonshire*, which sum, together with £668 15*s.*, being one moiety of the amounts paid by the eleven shareholders in respect of their shares, made up the sum of £2300. Each of the eleven shareholders executed a transfer of his shares to *Burke* or *Kearns*, and Mr. *Walker*, in particular, on the 14th of March, 1865, executed a transfer of his to *Burke*, who also executed the same; and after such execution the transfer was deposited in the hands of Mr. *Devonshire*.

A meeting of directors was held on the 27th of March, 1865, at which Messrs. *Kearns* and *Burke* were present. Mr. *Devonshire* also attended, and made a report respecting the actions brought by the company against the shareholders. After stating this report, the minutes of the meeting proceeded as follows:—

"Messrs. *Burke* and *Kearns*, as two of the present directors of this company, deeming it highly advisable to put an end to all further litigation, not only between the shareholders and the directors, but between the same shareholders and the company, with respect to the actions that had been brought by the company against those shareholders for calls, consented to purchase the shares of the respective Plaintiffs at one-half of the amount paid by them to the company, but upon condition that those Plaintiffs who were Defendants in the actions brought by the company should pay the company's costs of those actions, and those costs have accordingly been paid by being included in a sum of £2300, being the aggregate amount of costs subscribed for and paid by the respective Plaintiffs through the hands of their attorneys.

"The shares of the respective Plaintiffs, although with one or two exceptions forfeited by the company, have accordingly been transferred to Messrs. *Burke* and *Kearns* respectively, according to

a list which has been handed to the secretary. It will be well for the company to consider in what way those shares shall now be dealt with under the circumstances, and having regard to the moneys paid by Messrs. *Burke* and *Kearns* in the interest and for the benefit of this company, and with a view to the object and purposes of the company being forthwith carried out."

The evidence in this case did not shew whether *Walker's* shares were amongst those alluded to in the minute as having been forfeited; and nothing turned on the forfeiture.

It did not appear that the shares in question were subsequently dealt with in any way. The transfers to *Burke* and *Kearns* were never registered; but of this Mr. *Walker* had no knowledge or notice. On the 4th of May, 1867, the company was ordered to be wound up, and upon settling the list of contributories the official liquidator proposed to place Mr. *Walker* on it, inasmuch as his name had never been removed from the register of shareholders. At the request of Mr. *Walker* the question was adjourned into Court.

The articles of association provided that seven days' notice (unless dispensed with by the directors) should be given to the company by any shareholder intending to transfer his shares; and that in such notice should be specified the name, address, and description of the intended transferee, and the number of shares intended to be transferred; that the directors should have power to accept or reject such person as shareholder without reason assigned; that if they should reject such person, notice of such rejection should be given to the transferor within such seven days; and that in default of giving such notice they should be bound to allow the transfer.

Mr. *Baggallay*, Q.C., and Mr. *Davey*, for Mr. *Walker*:—

There has been unnecessary delay on the part of the company in registering the transfer, and Mr. *Walker* would be entitled to have his name removed from the register of shareholders under sect. 35 of the *Companies Act*, 1862, if there had been no winding-up order: *Nation's Case* (1). The winding-up order does not affect the right, neither does laches on the part of Mr. *Walker*: *Fox's*

(1) Law Rep. 3 Eq. 77.

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Case (1); *In re Colonial and General Gas Company*, before Vice-Chancellor *Stuart*, March 21, 1867.

Mr. *Wickens*, for the official liquidator, was not called upon.

LORD ROMILLY, M.R.:—

If I were to decide this case in favour of Mr. *Walker* I should reverse many decisions, and entirely destroy the benefit of the registration prescribed by the Legislature. The case, I think, may be shortly put thus: there is a compromise made by which the owner of certain shares makes a transfer of those shares on the 14th of March, 1865; and the deed is handed over to Mr. *Devonshire*, who is the solicitor of the company, or of certain directors of the company, in what I may call cross actions between Mr. *Walker* and the company. Then a meeting of the directors takes place, at which this compromise is distinctly stated and apparently sanctioned, but nothing further takes place. I cannot make out that even the deed of transfer was deposited with the company. Then, neither the company, nor the transferors, nor the transferees, take any notice of it for upwards of two years. Thereupon, when the winding-up takes place, the transferor, Mr. *Walker* says: "You must relieve me from my liability because you ought to have taken my name off the list of shareholders at that time, and put another person's on." But the answer to that is: "You have acquiesced in it, you have taken no step whatever to compel your name to be taken off, you ought to have seen that Mr. *Burke's* name was substituted for yours, and you cannot after this lapse of time say that because you have been in the wrong, and the company have been in the wrong also, you are entitled to alter the position of the share register after the winding-up order." If I held this not to be a conclusive answer, the register might be impeached after any number of years, whereas the object is to make the register conclusive as to who are the shareholders.

The distinction between *Fox's Case* (1) and this is, that in that case the Court determined that *Fox* ought never to have been registered as a shareholder. He was prepared to file a bill saying that he had been misled, and was entitled to have his name taken

(1) Law Rep. 5 Eq. 118.

off. If the company had refused to take his name off, there would have been a decree against them, just as there was in the *Venezuela Railway Case* (1); but instead of having recourse to litigation, the company gave way and took the name off the register without a bill being filed, exactly the same as if there had been a decree. There was no compromise, Mr. *Fox* had a case to shew that he ought never to have been a shareholder at all; and the Court came to the conclusion, upon reading the evidence, that the company were not bound to go to the expense of defending a suit in which they were sure to be beaten. The fault alleged here is that the company did not remove a name from the list of shareholders; that is a different case from one where the company did remove a name which they ought never to have put on, and where the fault was in putting the name on the list of shareholders, which was in the nature of a fraudulent act. That is quite different from a shareholder transferring his share and not taking care to get the transfer registered for upwards of two years before the winding-up order was made. The very object and purpose for which the Act is framed, as shewn by the clauses of the Act, is to enable you to provide against this particular emergency, and to enable the transferor to take care that the company shall make a proper entry in the register of the transfer of the shares. In cases where there has been no fault at all on the part of the transferor, and the fault is merely that of the company, the Court directs the transfer to be made, or the register to be amended, thus doing what ought to have been done. Where there has been no fault on either side, the register remains as it was—where the fault is on both sides, the register also remains as it was. I am of opinion that Mr. *Walker* must remain on the register for the fifty shares he took.

Solicitor for Mr. *Walker*: Mr. *Edell.*
Solicitor for the Official Liquidator: Mr. *Clements.*

(1) Law Rep. 2 H. L. 99.

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Jan. 30, 31;
Feb. 10;
April 17.

THOMSON *v.* WATERLOW.

Vendor and Purchaser—Right of Way—Grant—General Words: "Ways heretofore enjoyed."—Unity of Possession.

The owner of two adjoining closes, *A.* and *B.*, who had during the unity of possession made and used, for his own convenience for agricultural purposes, a way across *B.* to *A.*, executed a conveyance of close *A.* to a purchaser with these general words, "together with all ways, easements, and appurtenances thereto appertaining, and with the same now or heretofore occupied or enjoyed." The purchaser, who had access to *A.* from other land of his own, claimed under the conveyance the right to use the roadway over *B.*:—

Held, that as there was no roadway over *B.* to *A.* before the unity of possession, the right to use it did not pass under the general words of the conveyance.

The case of *Plant* v. *James* (1) considered.

MESSRS. *J. & R. FELLOWES* were, at the time of the conveyance to the Plaintiff hereinafter mentioned, the owners of a farm called *High Trees Farm*, comprising, among other fields, a meadow called *High Trees Meadow*, and a close on the south side thereof hereinafter referred to as the Defendant's close. On the east of the last-named close lay *Red Hill Common*, and a road from a gate on the south side of *High Trees Meadow* led across the Defendant's close to another gate opening into *Red Hill Common*, by which access was given from the common to *High Trees Meadow*.

The Plaintiff purchased *High Trees Meadow* and other adjoining lands from Messrs. *Fellowes*, and the conveyance, which was dated the 29th of December, 1862, comprised "all buildings, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, advantages, and appurtenances whatsoever to the said pieces of land, or any of them, appertaining, or with the same, or any of them, now or heretofore demised, occupied, or enjoyed, or reputed or known as part or parcel of them, or any of them, or appurtenant thereto."

The Plaintiff was then, and continued to be, the owner of an estate called *Blackstones*, abutting on the north side of *High Trees Meadow*, from which he could obtain access thereto.

(1) 5 B & Ad. 791.

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Subsequently to the Plaintiff's purchase the Defendant, on the 17th of December, 1863, purchased from Messrs. *Fellowes* the close over which the road from the common to *High Trees Meadow* passed, together with other lands.

The Defendant, after his purchase, locked the gate across the roadway where it entered *High Trees Meadow*, and refused to allow the Plaintiff to use the road.

The suit was instituted to establish the Plaintiff's right to use the road in question. The Plaintiff alleged that the conveyance gave him such right of way, and that he had enjoyed it without interruption until the conveyance to the Defendant of the close over which the road passed, and prayed a declaration of his right to use the road, with or without carriages or horses, from and to *High Trees Meadow*, and that the Defendant might be restrained from interfering with such user.

Conflicting evidence was given as to the origin and user of the road, the Plaintiff insisting that a right of way existed before *High Trees Meadow* and the Defendant's close were united in possession; the Defendant contending that the road was made after the unity of possession by Messrs. *Fellowes* for their own convenience. In the view of the Court it was established that the road was made and used by Messrs. *Fellowes*, or their predecessors in the ownership of *High Trees Farm*, for their own convenience while owners both of *High Trees Meadow* and of the Defendant's close.

Mr. *Baggallay*, Q.C., Mr. *Freeling*, Mr. *Fullarton*, and Mr. *Thomson*, for the Plaintiff:—

The Plaintiff is entitled to the use of the roadway over the Defendant's close from *Red Hill Common* to *High Trees Meadow*, not on the ground that it is an easement of necessity, or by prescription, but that it is an easement by grant, passing under the words "together with all ways to the said pieces of land appertaining, or with the same occupied or enjoyed;" words which would carry whatever right of way existed prior to the conveyance. This principle is laid down in some of the early authorities, as in *Wordledg* v. *Kingswel* (1). In *Staple* v. *Heydon* (2) it is said that a stranger

(1) Cro. Eliz. 794.

(2) 6 Mod. 1, 3.

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may have a way over another's soil for necessity, by grant, and by prescription; and the right of way by grant is thus illustrated: "If one be seised of *Blackacre* and *Whiteacre*, and use a way over *Whiteacre* from *Blackacre* to a mill, and he grant *Blackacre* to *B.* with all ways, easements, &c., the grantee shall have the same conveniency that the grantor had when he had *Blackacre*." The case thus put corresponds with the present, for while the same owners were seised of both properties, there was the use of the way to the one over the other from the common.

The principle thus established, and recognised in others of the early authorities, was adopted in *Plant* v. *James* (1), where a way over a certain estate which had always existed for the convenient use and enjoyment of a mansion, and had always been occupied and enjoyed with it while they were separate properties, but the right to which had been suspended during unity of possession, was held to pass to the grantee under the words "all ways usually used, occupied, or enjoyed as part thereof, and all the appurtenances thereto belonging."

That case was commented on in *Worthington* v. *Gimson* (2), where the Judges, on the particular facts of that case, arrived at a different conclusion, but upheld the former decision, affirming that the word "appurtenances" would comprehend a right of way which had been usually used, occupied, or enjoyed with the estate, as expressed in the operative part of the deed. *Barlow* v. *Rhodes* (3) was another case of the same class. The authority of *Plant* v. *James* is not touched by the case of *Polden* v. *Bastard* (4), which was afterwards affirmed by the Exchequer Chamber (5). In that case, a house in the occupation of a devisor had a pump belonging to it, which *T. A.*, the person who occupied another house belonging to the devisor, as yearly tenant, had been in the habit of using. The houses were devised thus:—"To *W. P.* I give the house I now live in; I give to *C. P.* the house as now in the occupation of *T. A.*" It was there held that the right to the use of the pump was not an easement, and did not pass to *C. P.*, and a distinction was drawn between the words "occupied" and "en-

(1) 5 B. & Ad. 791.
(2) 2 E. & E. 618.
(3) 1 Cr. & M. 439.
(4) 4 B. & S. 258.
(5) Law Rep. 1 Q. B. 156.

joyed." In *Kooystra* v. *Lucas* (1), where certain houses in *Oxford Street*, with a piece of ground which was part of an adjoining yard, had been leased to a tenant, together with all ways with the said premises, or any part thereof, used or enjoyed; and at the date of the lease the whole of the yard was in the occupation of the same person, who had always used a gateway not included in the demise as a mode of access to every part of that yard—it was held that the lessee was entitled to a right of way through the gateway to the parts demised to him. *Wardle* v. *Brocklehurst* (2) was a similar case.

As regards the evidence, we submit that it is established that the road was used for agricultural purposes to and from *High Trees Meadow* by the Messrs. *Fellowes*, and long before they purchased the estate, and that being so it passed to the Plaintiff by the general words in the conveyance.

Sir *Roundell Palmer*, Q.C., Mr. *De Gex*, Q.C., and Mr. *Speed*, for the Defendant:—

The Plaintiff's claim to this right of way is unfounded. The evidence clearly shews that the roadway in question was first used for carts by the Messrs. *Fellowes* for their own convenience for agricultural purposes. There is no evidence of such user before the unity of possession. No right is claimed by prescription, nor does the Plaintiff claim it as a way of necessity, for he has access to *High Trees Farm* from his own adjacent field. The sole question is whether the general words in the conveyance are sufficient to grant *de novo* a right of way in such a case. We submit that they are not, at all events, unless the particular way is itself specified.

In most of the authorities referred to on the other side, there had been an old right of way, though extinguished or suspended, which answered to the words "at any time heretofore occupied or enjoyed," that is, before the unity of possession, which renders them inapplicable to the present case. The case of *Plant* v. *James* (3) cannot, for that reason, be taken to govern the present case, in which it is clearly proved that no old right of way

(1) 5 B. & A. 830.
(2) 1 E. & E. 1058, 1065.
(3) 5 B. & Ad. 791.

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existed at all. In *Kooystra* v. *Lucas* (1) the question was whether a demise of part of land to the whole of which a real legal right of way was incident would, by general words, pass the right of way. None of these authorities touch the case of a grant by a vendor of a piece of land the access to which, for his own convenience, he has made across another piece of land not included in the conveyance. The insertion of the words, "together with all ways occupied therewith," cannot confer a right of user in such a case.

Mr. *Freeling*, in reply.

Apr. 17. LORD ROMILLY, M.R.:—

The Plaintiff, by his bill, asks for a declaration that he, and his workmen and servants, are entitled to use and pass over, either with or without horses or carriages, and without interruption, a particular roadway from and to the lands bought by him.

Two questions are raised: first, whether the right of way existed before the conveyance was made to the Plaintiff; and, secondly, whether the right of way was conveyed to him:—[His Lordship then stated the facts of the case.]

The question is whether, under the general words in the conveyance, the Plaintiff is entitled to the right of way claimed by the bill.

It is admitted that this mode of access to the meadow is not a road of necessity. The Plaintiff has access to the land from his own property adjoining on the north. Neither does the Plaintiff put his case so high as to claim this as a road by prescription, or assert that it ever was a public road; but it is contended that this mode of access was a road which was used by the vendor, and that being so used it passes under the words "all ways now or heretofore occupied or enjoyed," and for this purpose the Plaintiff relies on the case of *Plant* v. *James* (2).

The decision in that case was founded upon the construction of the deed of conveyance, and the question was, whether the words

(1) 5 B. & A. 830. (2) 5 B. & Ad. 791.

of the deed, properly construed, were such as to import that an old road which had become merged by unity of possession was restored, and that the vendor intended to create a right of way *de novo*. The words of the deed there are exactly the same as the words of the deed in the present case. The present case differs from it in this, that here no right of way existed prior to the occupation of the Messrs. *Fellowes*, but it was a road created by them during their enjoyment of the property.

3 Ex 168
10 QB 364

There is, as it appears to me, a distinction between the user of a way which has been made by the owner of adjoining closes, and a right of way which, previously to such unity of possession, existed from one close to another, and which has become merged by the fact of the same person having become the owner of both properties. I do not think that the Judges in *Plant* v. *James* (1) intended to lay down that such words of conveyance as were used in that case, and in the present, would constitute the grant of a right of way where the user had sprung solely from the convenience of the person who held both tenements, which convenience ceased to exist when the severance between the closes took place.

My meaning will be better explained by an example: Suppose the proprietor of a large farmyard, contiguous to and opening on a high road, to possess six fields continuously adjoining each other in a line diverging from the high road, and that for the convenience of cultivating them the owner has been in the habit of carting manure from the farmyard on to the most distant close, and also of conveying the produce of this field through the other fields to the farmyard, and on to the high road. If, in that state of things, the proprietor should sell the most distant field to a gentleman who made it a part of his park which was contiguous to it, and which was still more distant from the high road, does the case of *Plant* v. *James* mean to lay down, that in such a case, if in the conveyance the vendor used the words which are contained in this deed, the purchaser of the field would thereby acquire a right of way from his park through the land of the vendor to the high road, and through his farmyard? I think nothing less than express words describing such a road would be sufficient for such a purpose. But the case would be very different

(1) 5 B. & Ad. 791.

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if the owner of the park had always had a right of way from the park through the six closes to the high road, and had afterwards become the purchaser of those six fields and the farmyard, whereby the right of way had become merged by unity of possession, and if he had afterwards sold the park and the adjoining sixth field to a purchaser, and in the conveyance conveyed to that purchaser "all rights of way now or heretofore used, occupied, or enjoyed;" then these words would point expressly to the ways formerly used. Neither, in my opinion, does the decision in *Plant* v. *James* (1), if carefully considered in conjunction with the recognised law on this subject, established by a long series of authorities, vary the proposition, that during the unity of possession there is no right of way properly so called, because, of course, the owner can go over his own land whenever he pleases, and accordingly (to use the words of the cases) the previously existing right of way is merged by unity of possession. In that case the question was whether by the conveyance the vendor intended to revive that which had been destroyed by unity of possession. In the case before me there was no previous right of way to be merged; how then can unity of possession create in one case what it suspends in another case, and give to the purchaser of the outlying closes all the same modes of access over the rest of the adjoining property of the vendor which that vendor used before the sale? It is clear that it cannot, on behalf of the Plaintiff, be put less high than this, for why should the purchaser be allowed to select one out of half a dozen ways which the vendor was habitually using?

It is obvious, therefore, that if these words were held to create a new right of way, they would give to the purchaser of the outlying field a right of going over the adjoining property of the Messrs. *Fellowes* in every direction in which they had been accustomed to go from or to the land in question, and that in a case where such access is not necessary for the convenient use and occupation of the piece of land so sold. This evidently could not be the intention of the vendors. The question depends upon the construction of the deed; and it is clear that these words have only a natural meaning belonging to the circumstances of the case, and not a technical meaning extending to every road which the owner may

(1) 5 B. & Ad. 791.

have made for his own temporary convenience. I do not think the words have such a meaning by themselves. I do not think the vendors used them in that sense. I think no case exists which compels me to give them a meaning contrary to that which, in the circumstances of the case, they will properly bear.

The case, therefore, must depend upon this circumstance, whether there was a road used before the vendors held the property; in other words, whether it was an old road which became merged by the unity of their possession, or whether it was simply a road used for their own convenience in managing the property.

On this point a great deal of evidence was given, and the conclusion I have come to after carefully going through it is, that there never was a road used for horses or carts at any time over the spot in question before the possession of the Messrs. *Fellowes*, the vendors, and that since their possession it has not been used except for the mere personal convenience of the Messrs. *Fellowes* in the management of their property. It does not appear that there ever was any user of this road or way except by the owners of *High Trees Farm*, and that only for their own convenience. Such user does not, in my opinion, constitute a right of way, and therefore a right of way does not pass under the words in this conveyance, which can only apply to rights of way then existing or which previously had existed; but as to this road, no man had the right to go over it except the owners, and that word "right" imports that at some time some person other than the owners had the right of going over it, which I am of opinion is disproved in the present case. Any other meaning of the word "right," as applied to a way, is devoid of sense; because, of course, every absolute owner of a property can use it, and go over it in every direction he pleases.

I have considered this case solely as regards the right of horses and carts going over, which I understand to be the sole question in contest. In my opinion this fails, and the bill must be dismissed, and the costs must follow the result.

Solicitors for the Plaintiff: Messrs. *Roberts & Simpson*, agents for Mr. *G. C. Morrison, Reigate.*

Solicitors for the Defendant: Messrs. *Merriman & Pike.*

V.-C. W.

1868

March 2, 4.

COVENTRY *v.* GLADSTONE.

Stoppage in transitu—Overside Order in favour of Mortgagees—Termination of Ship's Voyage.

Goods were shipped by *A.*, a firm at *Calcutta*, to the order of *B.* in this country. *B.* pledged the bill of lading to *C.*, and afterwards became bankrupt. On the arrival in the *Thames* of the ship in which the goods were, *C.* obtained from the brokers, on payment of the freight, an overside order for the delivery of the goods. On presenting this order to the chief officer on board the ship the lighterman employed by *C.* to bring away the goods was told that he should have them as soon as they could be got at. In the meantime, before the ship broke bulk, *A.*, by their agents in this country, served notice upon the captain and agents of the ship to stop the delivery of the goods to any person other than themselves:—

Held, that by the mere promise to deliver them to *C.* when they could be got at the goods were not brought into the actual or constructive possession of *B.* so as to prevent *A.*, the unpaid vendor, from exercising his right of stoppage *in transitu*; and accordingly that *A.* was entitled, as against the assignees in bankruptcy of *B.*, to the surplus proceeds of the goods after satisfying the charge of *C.*

THIS was a Petition by Messrs. *Gillanders, Arbuthnot, & Co.*, the consignors of a cargo of linseed from *Calcutta*, and Messrs. *Gladstone, Ewart, & Co.*, their agents in this country, for the purpose of obtaining payment of the surplus proceeds of the cargo (now standing in Court) after satisfaction of the claim which was established by the decree made at the hearing of the cause in July last in favour of the Plaintiffs, the mortgagees of the bill of lading.

The facts of the case are stated in the report (1), and it will be sufficient on the present occasion to state that in September, 1865, *Gillanders, Arbuthnot, & Co.* shipped from *Calcutta*, on board the ship *Ganges*, a cargo of linseed to the order of *Percival John Waite*. *Waite* obtained the bill of lading from *Gladstone, Ewart, & Co.*, the agents in this country of *Gillanders & Co.*, and pledged it on the 2nd of November, 1865, to Messrs. *Coventry*, the Plaintiffs, as a security for an advance of £1000. In December, 1865, *Waite* was adjudicated bankrupt. On the 24th of January, 1866, on receiving notice of the arrival of the *Ganges* in the *Thames*, the

(1) Law Rep. 4 Eq. 493.

Plaintiffs presented the bill of lading to Messrs. *Wilson, Bilbrough, & Co.*, the brokers of the ship, and on paying £170 for freight obtained an "overside" order for delivery to them of the linseed in the following terms:—

"116, *Fenchurch St., London.*
"Jan. 24, 1866.

"To the Chief Officer on board ship *Ganges,*
"Capt. *Funnell, @ Calcutta.*

"You may pass craft out of dock with the undermentioned goods entered for landing at taking the lighterman's clear receipt for the goods before granting the pass.

"1365 Bags of Linseed.

P. J. W.

"(Signed) *Pro Wilson, Bilbrough, & Co.,*
"*Henry Moon.*"

This order was presented by the lighterman employed by the Plaintiffs to the chief officer of the ship on the 25th of January. At this time the ship had not broken bulk, and the chief officer promised that when the goods at the top of the seed had been got out, and the seed was clear, it should be delivered to the Plaintiffs' lighterman. In the meantime, on the 26th of January, Messrs. *Gladstone, Ewart, & Co.* sent to the captain of the *Ganges* the following notice:—

"We hereby stop the delivery of the 1365 bags of linseed to any other person than ourselves, and we hereby require and demand that the same may be delivered to us as the owners thereof."

On the following day (the 27th of January) a notice in exactly similar terms, with the exception that it was signed "*Gillanders, Arbuthnot, & Co.*" instead of "*Gladstone, Ewart, & Co.*," was sent to Messrs. *Wilson, Bilbrough, & Co.*, the brokers of the ship. The Plaintiffs' lighterman attended with his barge every day alongside the *Ganges,* but after the ship had commenced discharging her cargo (the 30th of January), and the seed was clear, the mate refused to deliver it, saying that he had orders from the brokers of the ship to land it on the quay.

Under these circumstances Messrs. *Coventry* filed their bill to enforce their rights as assignees for value of the bill of lading.

Upon the hearing of the suit in July last His Honour, over-

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ruling the defence set up by *Gillanders, Arbuthnot, & Co.*, and *Gladstone, Ewart, & Co.*, that the bill of lading had been improperly pledged by *Waite* from having come into his hands irregularly, held that the title of the Plaintiffs as *bonâ fide* assignees for value must prevail over any claim by the unpaid vendors. Payment was accordingly ordered to the Plaintiffs out of the proceeds of the linseed of the amount due to them, and the balance, after such payment, was directed to be paid into Court, with liberty for the parties to apply in respect thereof. This balance, amounting to £509, was claimed by the Petitioners (*Gillanders, Arbuthnot, & Co.*, and *Gladstone, Ewart, & Co.*) as unpaid vendors, and the claim was opposed by the assignees in bankruptcy of *Waite* on the ground that the notice to stop the goods served on the 26th of January was too late, and, further, that it was not made by a person duly authorized to give such notice.

Evidence was adduced as to the custom of merchants with regard to overside orders, and the following passage was contained in an affidavit filed on behalf of the Respondents, the assignees of *Waite*:—

"It is the custom among shipping brokers never to give an overside order or release for goods brought by the ship to any person other than the holder of the bill of lading, and such bill of lading is either produced to the ship-brokers, and marked by them, or is given up to them at the same time that the overside order or release is received from them. Whether, however, the bill of lading is given up or not, and even if it should be lost after the granting of the overside order, the holder of the overside order is entitled to an immediate delivery of the goods, and the officer in charge of the ship containing the same is bound to deliver the same to him when the order is presented; and if immediate delivery is impossible, the goods are thenceforth retained on board for convenience only, but the voyage as to such goods is at an end."

Mr. *G. M. Giffard*, Q.C., and Mr. *Skene*, in support of the Petition:—

Until the goods come into the actual possession of the purchaser

or his assignee, or there has been something equivalent to actual delivery, the vendor retains his right to stop them, and the mere arrival of the ship at the port of destination before such actual delivery to the consignee does not put an end to the *transitus*: *Bohtlingk* v. *Inglis* (1); *Berndtson* v. *Strang* (2). In this case, before the goods could be delivered from the ship to the lighterman employed by the Plaintiffs to receive them, the vendors, by their duly authorized agents in this country, served notice of stoppage, which was in time; and although the title of the Plaintiffs as indorsees for value of the bill of lading is paramount to the extent of the specific advance upon the cargo, the right of the consignors is barred to that extent only, and they are entitled in equity to the difference between the sum for which the pledge was made and the sum realized by the sale of the goods: *Spalding* v. *Ruding* (3); *Whitehead* v. *Anderson* (4); *Snee* v. *Prescott* (5); *Naylor* v. *Dennie* (6); *Parsons* on Contracts (7); *Griffith* and *Holmes'* Bankruptcy (8).

Mr. *Druce*, Q.C., and Mr. *Lindley*, for the assignees of *Waite*:—

First: As soon as the goods reached the port of destination and the overside order was presented on behalf of the Plaintiffs, who had paid the amount of freight, the captain of the ship who received the order ceased to hold the goods as a forwarding agent, but was invested with the character of a custodian bound to hold them for the convenience of the Plaintiffs. As between vendor and vendee the delivery was complete and the *transitus* was at an end: *Harman* v. *Anderson* (9); *Pearson* v. *Dawson* (10); *Bird* v. *Brown* (11); and the consignors, who have consequently failed in their attempted stoppage, are not entitled to the surplus proceeds as against the assignees in bankruptcy of *Waite*. *Spalding* v. *Ruding* does not touch the present case. The question was not, as here, whether the *transitus* was at an end when the notice of stoppage was given, but what was decided was that a pledge of the bill of

(1) 3 East, 381.
(2) Law Rep. 4 Eq. 481.
(3) 6 Beav. 376.
(4) 9 M. & W. 518.
(5) 1 Atk. 245 (cited in 6 East, p. 28, n.)
(6) 8 Pickering (American), 198.
(7) Page 489.
(8) Page 341.
(9) 2 Camp. 243.
(10) E. B. & E. 448.
(11) 4 Ex. 786.

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lading does not, subject to the particular pledge, affect the right of the consignor to stop the goods *in transitu.*

Secondly: Apart from the effect of delivering the overside order, the notice given by *Gladstone & Co.*, who were merely general agents of the consignor and had no authority for the purpose, was inoperative to stop the delivery of the goods, and there is no evidence of anything like a ratification of their act until the *transitus* had been long at an end: *Bird* v. *Brown* (1); *Hutchings* v. *Nunes* (2).

Mr. *Giffard*, in reply.

SIR W. PAGE WOOD, V.C.:—

The question upon this Petition is, whether Messrs. *Gillanders, Arbuthnot, & Co.* by themselves or their agents, effected, as against *Waite's* assignees, a stoppage upon these goods while they were still *in transitu*, or whether the notice to stop their delivery came too late. The mortgage to the Plaintiffs, Messrs. *Coventry*, having been decided to be undoubtedly good, the doctrine laid down in *Spalding* v. *Ruding* (3), that the transfer of goods for valuable consideration by a consignee for a limited purpose does not destroy the consignor's right of stoppage *in transitu, ultrà* the particular lien of the transferee, is distinctly applicable if the consignors delivered such notice of stoppage before the goods reached their destination. I think, upon the whole of the evidence, that I must hold that before the goods were at home there was such a notice as would have stopped them as against the consignees of the cargo.

It is clear that on the 1st of February nothing had been done in the way of delivery of the cargo. The mortgagees, as I have already held, were right from beginning to end, and entitled to repay themselves the amount of their specific advance out of the proceeds of the goods, but the question is, whether any possession, which could be deemed to be the possession of the mortgagor as against *Gillanders, Arbuthnot, & Co.*, was obtained by his mortgagees before the notice of stoppage was served by *Gladstone, Ewart, & Co.*,

(1) 4 Ex. 786. (2) 1 Moo. P. C. (N.S.) 243.
(3) 6 Beav. 376.

as agents in this country of *Gillanders & Co.* I get rid of the question which has been raised whether Messrs. *Gladstone & Co.*, as mere agents, were entitled to send notice to stop the goods, as it appears to me—and it was, indeed, admitted—that it was in fact notice by the consignors, the *Calcutta* firm. The mortgagees having obtained an overside order from the brokers of the ship, send their lighterman with it to the ship, and it is by him presented to the chief officer on board. At this time the ship had not broken bulk, and the lighterman employed by the Plaintiffs is told by the chief officer that when the linseed can be got at it will be delivered to him. The question, therefore, is, whether this is an attornment which made the goods at home, in the constructive possession, subject to the mortgage, of the mortgagor. The affidavits filed on behalf of the Respondents state that "the holder of the overside order is entitled to an immediate delivery of the goods, and the officer in charge of the ship containing the same is bound to deliver the same to him when the order is presented, and if immediate delivery is impossible, the goods are thenceforth retained on board for convenience only, but the voyage as to such goods is at an end." I was struck at first with this statement, but I think that it does not come up to the mark. The question is not whether the voyage is at an end, but whether the goods are at home, actually or constructively in the possession of the vendee. The law upon the subject is thus laid down by Baron *Parke* in *Whitehead* v. *Anderson* (1):—"The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems no doubt that the transit would be at an end, though in the case of the absence of the carriers' consent it may be a wrong to him for which he would have a right of action. This is a case of actual possession, which certainly did not occur in the present instance. A case of constructive possession is where the carrier enters expressly or by implication into a new agreement, distinct from the

(1) 9 M. & W. 518.

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original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character for the purpose of custody on his account, and subject to some new or further order to be given to him." And in *Wentworth* v. *Outhwaite* (1), *Parke*, B., uses the following language:— "Again, I think the goods had arrived at their place of destination, for that, as I understand, means the place to which they were to be conveyed by the carriers, and where they would remain unless fresh orders should be given for their subsequent disposition. In this respect the case falls within the principle of *Dixon* v. *Baldwin* (2), in which Lord *Ellenborough* lays down the doctrine that the *transitus* is completely at an end when the goods arrive at an agent's, who is to keep them until he receives the further orders of the vendee."

These two cases lay down the law, and are really conclusive upon the present case. The mere sending a barge to the ship, and the man in charge of such barge being told that he must wait until the goods can be got at, does not amount to an actual delivery of possession of the goods, which are not "at home" until actually in the barge or cart sent for them. There may be a part delivery which would operate as a constructive delivery of the whole, but that rule is confined to cases where the delivery of part is intended to be a delivery of the whole, and here there was no such part delivery. The case of constructive possession might arise when the carrier entered into a new agreement to keep the goods for the vendee distinct from that originally entered into by him to convey them to their place of destination pursuant to the bill of lading, but here no new order was given to the captain to keep the goods on behalf of the vendee; and the rule laid down in *Whitehead* v. *Anderson* (3) is not touched in these affidavits. In order to put an end to the exercise by the unpaid vendors of their right of stoppage *in transitu* the goods must have arrived at their original destination, or at the place directed as the place of delivery by the original consignee or the person in possession of the bill of lading. At the time when the notice was served the original

(1) 10 M. & W. 436. (2) 5 East, 175.
(3) 9 M. & W. 518.

duty of the captain was not terminated, nor was it converted into a new duty to retain the goods as agent for the consignee; and, accordingly, it appears to me that the Petitioners were able to exercise, and have validly exercised, their right of stopping the goods, and that they are entitled to the surplus proceeds of the cargo.

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Solicitors: Messrs. *Whites, Renard, & Floyd*; Messrs. *Francis & Bosanquet.*

NASH *v.* COOMBS.

V.-C. W. 1868 *Jan.* 22, 25.

Common Lands—Compensation, Application of—Lands Clauses Act, ss. 102, 103, 104, 107.

Every resident freeman of the borough of *B.* had the right of annually turning on to the *Freemen's Common* (allotted under an Inclosure Act of 1795 to the corporation, as trustees of the allotment, in lieu of certain rights of common of resident freemen) one head of stock, for a period fixed from time to time by the town council, subject to a payment annually fixed by the town council for every head of stock so turned on; this right was transferable.

A portion of the *Freemen's Common* having been taken by a railway company, on a bill to obtain the direction of the Court as to the application of the purchase-money, filed by the committee appointed under sect. 102 of the *Lands Clauses Act*:—

Held, that the present resident freemen were not entitled to have the *corpus* of the purchase-money divided amongst them, but that the proper course would be to invest the money in land, to be held in trust for the freemen from time to time resident within the borough, and in the meantime that the money ought to be invested, and the dividends paid to such resident freemen at the same time in each year as they had been accustomed to enter upon the enjoyment of their rights of common.

4 Ch. 458
20 Eq 407.

THIS was a suit for the purpose of ascertaining and apportioning the rights of all parties to a sum of £3053 6*s.* 10*d.*, representing the purchase-money of a piece of land in the parish of *St. Paul, Bedford*, forming part of the *Freemen's Common*, and taken by the *Midland Railway Company*, in 1865, for the purposes of their undertaking.

The bill (which was filed by a committee of the resident freemen appointed under the *Lands Clauses Act*, ss. 102, 103) stated an

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award of the 12th of June, 1797 (afterwards enrolled), made by the Commissioners appointed under an Inclosure Act of the 35 Geo. 3, by which the Commissioners allotted:—"Unto and for the mayor, recorder, deputy-recorder, aldermen, bailiffs, common council, and chamberlains, for the time being, and their successors, trustees of the allotment, in lieu of and for the rights of common of the resident freemen of the borough of *Bedford* in *Trumpington Meadow, Cymbury Mead*, the provenders and other commonable places in the said parishes of *St. Paul, St. Peter*, and *St. Cuthbert*, where resident freemen had a right of common, one plot or parcel of land in the said parish of *St. Paul*, containing 18A. 2R. 20P., &c."

At the time of this award and now the freemen were divided into two classes, viz., burgesses and freemen. Every son of a burgess born after his father's admission to be a burgess had the right to be made a burgess on attaining twenty-one. In the case of freemen, only the first son born after his father's admission had the right to be made a freeman.

The freemen are also divisible into residents and non-residents. At the time of the award, and until the passing of the *Municipal Corporations Act* (5 & 6 Will. 4, c. 76), the non-resident freemen had no rights of common over the commonable lands of the corporation, though any non-resident freemen might obtain such rights by coming to reside in *Bedford*.

On the 22nd of April, 1865, the *Midland Railway Company* served the town clerk of *Bedford* (one of the resident freemen) with two notices to treat for 3A. 1R. 29P., part of the *Freemen's Common*: one of such notices being addressed to the "Mayor, Aldermen, and Burgesses of the Borough of *Bedford*," and the other to "The Resident Freemen of the Borough of *Bedford*." The company also, under the provisions of the *Lands Clauses Act*, s. 102, convened a meeting of the resident freemen for the purpose of appointing a committee to treat with the company for the compensation to be paid for the extinction of the commonable and other rights (if any) of the freemen in or over the lands required by the company for the purposes of their undertaking.

An agreement was come to for the purchase of the land comprised in the notice to treat, and of an additional piece of land, also part of the *Freemen's Common*, for £3010, and in January, 1866,

the conveyance to the company was executed, the mayor, aldermen, and burgesses of *Bedford*, in whom the legal estate of inheritance in the *Freemen's Common* was considered to be vested, being parties thereto of the first part.

The committee, as trustees of the fund paid by the company for purchase and compensation money, had filed the present bill for the direction of the Court as to its application, against a resident and a non-resident freeman, who were made Defendants as representatives of the classes to which they respectively belonged.

Inquiries had been directed at the original hearing, and the case now came on upon further consideration.

The rights of the resident freemen in respect of common were thus stated by the Chief Clerk in his certificate:—"Every resident freeman of the said borough has the right of annually turning on to the *Freemen's Common* one head of stock, for a period fixed from time to time by the town council of the borough, and since the year 1859 it has been the practice of any resident freeman who at the time of the annual opening of the common for stock has either not wished to turn on any stock of his own, or has had none to turn on, to sell his right for the year to any persons wishing to purchase it; but the aforesaid right is subject to the payment of a sum of money, annually fixed by the town council, for every head of stock so turned on to the said common, whether belonging to a resident freeman, or to the purchaser of a commonable right from such resident freemen, and every such sum is payable to a fund under the control of the said town council, out of which rates and other expenses with reference to the *Freemen's Common* are paid."

Mr. *G. M. Giffard*, Q.C., and Mr. *Wickens*, for the Plaintiff.

Mr. *Druce*, Q.C., and Mr. *E. R. Turner*, for the corporation:—

The case does not fall within sect. 104 of the *Lands Clauses Act*, so as to entitle the resident freemen to have the money divided out between them. The freemen cannot claim this right of *profit à prendre in alieno solo* by custom: *Gateward's Case* (1); *Mellor* v. *Spateman* (2). Such a claim can only be alleged by prescription; but being a fluctuating, indefinite body, incapable of taking by

(1) 6 Rep. 59 b. (2) 1 Wms. Saund. 339.

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grant, the resident freemen cannot prescribe: *Constable* v. *Nicholson* (1). The right is vested in the corporation, as trustees, for the benefit of those of the freemen who are resident, and the only order that can be made upon this Petition is, that the money be re-invested in land over which the corporation shall exercise the same dominion as they have hitherto done over the lands taken. The words of sect. 104, so far as they seem applicable to an interest such as that here set up, may be satisfied by those peculiar tenures, such as "shack" in *Norfolk*, where rights of common exist for a part of the year over lands held in severalty for the remainder of the year.

[They also cited *Rex* v. *Inhabitants of Warkworth* (2); *Beadsworth* v. *Torkington* (3); *Benson* v. *Chester* (4); *Elton* on Commons (5).]

Mr. *Karslake*, Q.C., and Mr. *T. Stevens*, for the resident freemen, contended that whatever benefit was derived from the sale of their commonable rights enured to the benefit of the resident freemen only, and that they were entitled to have the *corpus* of the purchase-money, under sect. 104 of the *Lands Clauses Act*, divided between them.

The corporation were not trustees of the land sold, and in any case were not entitled to the capital of the fund now standing in Court, and had no right to intervene in the present suit.

[They referred to the *Inclosure Act*, 17 & 18 Vict. c. 97, which provides (sect. 15) that where money shall have been paid to a committee under the provisions of the *Lands Clauses Act*, and the majority of the committee shall be of opinion that the provisions of the *Lands Clauses Act* cannot be satisfactorily carried out, they may apply to the Commissioners to determine whether the compensation money shall be apportioned under this Act, while sect. 20 directs that where the sums payable shall not exceed £20, the whole shall be paid to the person having such limited interest. They also referred to the *Municipal Corporations Act*, 5 & 6 Will. 4, c. 76, s. 2.]

(1) 14 C. B. (N. S.) 230.
(2) 1 M. & S. 473.
(3) 1 Q. B. 782.
(4) 8 T. R. 396.
(5) Page 30, *et seq.*

Mr. *W. M. James*, Q.C., and Mr. *W. H. Townsend* for the non-resident freemen.

Mr. *Chitty*, and Mr. *Goldsmith*, in the same interest.

SIR W. PAGE WOOD, V.C.:—

I have not any doubt that the present resident freemen have no such fee simple right as is contended for. The only difficulty that arises is that the *Lands Clauses Act*, and the *Inclosure Act* (17 & 18 Vict. c. 97) also, do not seem to have had within their purview the particular case which has happened here. The position of these resident freemen seems to be this:—A certain set of persons, called resident freemen, from year to year, and only while they reside, enjoy the right (which ceases when they cease to reside, and revives when they come back again) of putting one beast out to graze on this particular piece of land for a certain season in the year. It appears that there is a considerable district subject to this arrangement, and that it was allotted "unto and for the mayor, recorder, deputy recorder, aldermen, bailiffs, common council, and chamberlains, for the time being, and their successors, trustees of the allotment" (a somewhat strange regulation), "in lieu of and for the rights of common of the resident freemen of the borough of *Bedford*." What I should suppose would be the right of the parties under that would be, that whoever these trustees might be, whether a corporation or not, they became trustees for the resident freemen for all time, and not for those only who at the time when the Act passed (1795) had become and were resident freemen. It would be just as reasonable to say that at that moment all those resident freemen would have had a right to file a bill to have the land divided amongst them, as to say that the present resident freemen have the right contended for. Their rights are simply shifting rights. A body is attempted to be constituted—either a corporation or a body of persons—who were named trustees, and as trustees their trust was for the resident freemen of the borough for all time. They might have built on the land, and have used it in any manner—although probably not without the concurrence (that may or may not be) of the resident freemen for the time being—so long as it was for the

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benefit of the resident freemen. It is a trust given to them to hold in lieu of the rights of common, so that all they had to do was to regulate the mode in which it should be enjoyed. The Legislature has simply indicated that this land is available for any purpose to which the trustees and freemen like to put it. Suppose it turned out very valuable for building purposes, possibly they might have had to have recourse to this Court before applying it to those purposes, regard being had to the particular nature of the trust, but I apprehend that they could use the land in any way most agreeable to the resident freemen. However, they take upon themselves to say that the best thing to do with the land is to apply it to the same purpose as that in lieu of which it was allotted was used.

Under the *Lands Clauses Act* there are two classes of clauses relating to matters of this kind. First: Where the soil is in the lord of the manor, there being commoners having a right of common on the wastes of the manor, which is a totally different case to that which we have here. Then comes sect. 101, which provides how the compensation for common lands, "the right to the soil of which shall belong to the commoners, as well as the compensation to be paid for the commonable and other rights in or over common lands, the right in the soil whereof shall not belong to the commoners, other than the compensation to the lord of the manor or other party entitled to the soil thereof, in respect of his right in the soil thereof," shall be ascertained. Having disposed of the lord of the manor, there may be a case in which a person, not being a lord of the manor, still holds land subject to a commonable right, and there may be a case of common lands in which the soil would be subject to the commoners. It occurs sometimes that lands are cultivated at certain periods of the year by all the inhabitants in common, so that it is a common right in the land itself. The commoners in such a case may have a right to cultivate it in patches according to the prescription under which they claim the right. And that this is the meaning appears more likely from the expressions used in the Act, which speaks of extinguishing the rights of the commoners as well as of the compensation to be paid in respect of the commonable and other rights in or over the lands. Then when the committee has been appointed

(sect. 102) they have a right to treat, and when they have treated they have a right to receive the compensation agreed to be paid, and then the direction is this: "And such compensation when received shall be apportioned by the committee among the several persons interested therein, according to their respective interests." Upon this part of the clause the whole question in the present case turns.

These existing resident freemen say they are the only persons interested in the land, and that the money which has been paid for the fee simple ought to be divided between them. In passing, I ought to observe that the whole treaty entered into by this committee has been for the extinction of the commonable rights over the land. They have dealt with and conveyed the land, not a word being said about any other right over it; and probably that may be the correct mode of dealing with it. I think they would have a right to deal with the company for the sale of this commonable right in the land. Having done that, they have to apportion the respective interests. A person who has only got an interest every year that he resides has not got a fee simple interest. Take the case of the owner of an enclosed farm who has a commonable right attached to the occupation of the property. If he is only tenant for life the committee who are "to pay the amount to the persons interested according to their respective interests," ought not to pay him the whole value of the land. It must be invested, so that tenant for life and tenant in remainder shall get their proper shares. Each is to be paid according to his interest. In the *Inclosure Act*, to which I was referred by Mr. *Stevens*, the amount was to be handed over to the Inclosure Commissioners to deal with as between the tenant for life and the reversioner, and if the amount was under £20 then power was given to overlook any person beyond the actual occupier, and pay him the whole; and it was contended by Mr. *Karslake* that although it might be somewhat strange to give these persons, who have something short of a life interest in the property, the whole interest in the property, yet that it is analogous to the £20 clause in the *Inclosure Act*, because the Legislature thought, rightly or wrongly, that as to commonable interests, when they were found to be trifling, they might be apportioned to the holders of them, whoever they might be, and however

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small or however precarious the existing interest might be. But there might be a case where the land would be valuable for building purposes when this right of feeding cattle was disposed of. In such a case the interest might be considerable in the different persons who had rights, and I cannot hold that it was intended to hand over the whole fee simple interest in the property to persons having only this temporary and fluctuating interest. Then comes sect. 107, which enables the Court "to order payment of the money so deposited to a committee to be appointed as aforesaid, or to make such other order in respect thereto for the benefit of the parties interested, as it shall think fit." That means according to their several rights and respective interests in having an investment of it, and dealing with it in that way. The committee have filed a bill for the purpose of the Court dealing with it according to the rights and interests of the several parties, and all I can do now is to take care that the property shall be applied in accordance with the scheme of the *Lands Clauses Act*, which is according to the several interests of the parties. What I propose, therefore, to do is to declare that the money paid into Court ought to be re-invested in land, to be held on the same trusts as those upon which the lands taken by the railway company were held, viz., in trust for the freemen of the borough of *Bedford* from time to time residing within the limits of the ancient borough, and in the meantime the same ought to be invested, and the dividends paid (subject to payment of costs) to the trustees, and divided by them amongst such resident freemen at the same time or times as such freemen have been accustomed in each year to enter upon the enjoyment of their rights of common.

Solicitors: Messrs. *Young, Maples, Teesdale, & Nelson;* Messrs. *Iliffe, Russell, & Iliffe.*

WEST *v.* MILLER.

V.-C. M.
1868
March 13, 14.

Construction of Will—Period of Vesting—"Received," read "receivable."

A testator gave the residue of his property to trustees to invest and pay the interest, or so much as they should think fit, to his wife until his daughter should attain twenty-one, for the support of herself, and the maintenance and education of his son and daughter; and when his daughter should attain twenty-one, then to divide the property between his two children, and in case of the death of either of them without issue before their estates or interests should be received, then to pay the interest of the one so dying to the survivor, but in case either should die previous to the time aforesaid leaving issue, then the issue were to take the parent's share, and in case both died previous to the time aforesaid without issue, then he gave the property over. By a codicil the testator declared that the payments directed to be made by his will for the benefit of his wife during the minority of his daughter should be continued during the life of his wife, although she might live beyond that period, and noticing the death of his son he gave the son's portion to the daughter in the same manner as her own share. The daughter attained twenty-one, and died, leaving issue, before the testator's wife:—

Held, that the daughter's interest was vested at twenty-one, though her right to receive the property was intercepted until the death of the wife.

THIS case came on upon motion for a decree. The subject matter of the suit was an ascertained sum of £666 13*s.* 4*d.*, being the amount of the residuary estate of *James Carlisle*, as realized by the trustees.

James Carlisle, by his will, dated the 31st of May, 1834, gave the residue of his property to trustees upon trust to sell and invest the proceeds, and receive and pay the interest on so much thereof as they might think sufficient unto his wife until his daughter *Mary* should attain twenty-one, for the support of herself, and the maintenance, education, and advancement in the world of his two children, *John* and *Mary;* and immediately after the death of his wife, in case she should die during the minority of his daughter, or in case his trustees should remove his children from the care of his wife, or so soon as his daughter should attain twenty-one, then upon trust, in case his daughter should be a minor, to apply the interest for the maintenance and education of his two children; and as soon as his daughter should attain her

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majority, then to call in all invested moneys, and divide the same equally between his two children. "And in case of the death of either of them without lawful issue before their respective estates or interests under this my will shall be received; then upon trust to pay the estate or interest of him or her so dying unto the survivor of them, to whom I give and bequeath the same accordingly. But in case either of them die previous to the time aforesaid, leaving lawful issue, then I direct that such issue do take their respective parent's share equally amongst them; and if but one, then to such one child only, his or her executors, administrators, or assigns, to whom I give and bequeath the same accordingly. And in case both of them die previous to the time aforesaid without leaving lawful issue them surviving, or, leaving lawful issue, such issue shall also die during their minority, then upon trust to pay the same to my brother *John* for his absolute use if he be then alive; but if dead, then to pay the same unto the children of my said brother *John* in equal shares and proportions when they respectively attain the age of twenty-one years, to and for their own use and benefit." Then followed a gift over to the children of the testator's late brother *Thomas*, in the event of his brother *John* being dead without leaving issue, or such issue dying under age.

By a codicil to his will, dated the 7th of March, 1836, the testator declared as follows: "That the investments directed to be made by my will shall be continued during the life of my said wife, although she may live beyond the time of my daughter *Mary* attaining the age of twenty-one years, and that the payments directed to be made to my said wife for or in respect of the dividends, interest, and proceeds arising thereby shall be continued during the life of my said wife; and as my son *John* is now dead, I give and bequeath the share, and other estate and interest, which he would have been entitled to had he survived me unto my daughter *Mary*, and direct the same to be paid and applied along with and in manner as her own share and interest may be."

The testator died in December, 1836. The testator's daughter *Mary* attained the age of twenty-one, married the Plaintiff, *Francis West*, and died in May, 1862, leaving one child, now an infant. The Plaintiff took out administration to her estate. The testator's widow died in January, 1866.

The Plaintiff alleged that his wife on attaining the age of twenty-one acquired a vested interest in the trust fund, and became absolutely entitled thereto, subject only to the interest of the testator's widow for life. He therefore claimed, by his bill, that the trust fund should be paid over to him absolutely as the legal personal representative of his wife.

The testator's brother *John* died in December, 1866, without issue, having, by his will, bequeathed all the property coming to him from the testator, *James Carlisle*, to trustees upon the trusts of the will of the said *James Carlisle*.

The Defendants, who were the infant child of the testator's daughter *Mary*, and the children of his brother *Thomas*, alleged that the Plaintiff's wife was not to acquire an indefeasible interest in the trust fund except in the event of her surviving the testator's widow, and that by reason of her death before the widow, the substitutional gift in the will in favour of the issue of the daughter had come into operation subject to the contingency of such gift being defeated in the event of her infant daughter dying before she should have attained the age of twenty-one, in which case it was alleged that the Defendants (the children of the testator's brother *Thomas*) would become absolutely entitled to the trust funds equally.

Mr. *Shee*, Q.C., for the Plaintiff:—

The Plaintiff's wife *Mary*, under the will of her father, took an indefeasible interest upon attaining twenty-one, not subject to be displaced by any contingency, and the codicil had no other effect than that of postponing the enjoyment without altering the right, consequently the property passed on her death to her personal representatives. The word "received" must be read, like "receivable," as "entitled to."

Mr. *T. Humphry*, for *Mary Carlisle West*, the child of the testator's daughter:—

The time when the testator's daughter would be entitled to receive the property is altered by the codicil, and both must be read as one instrument. The effect of the entire will, therefore, is to give the property to the wife during her life. The word

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"received" must be read as "entitled to receive," and the daughter was not entitled to receive until the death of the wife: *Hallifax* v. *Wilson* (1); *In re Dodgson's Trust* (2); *Re Yates's Trust* (3); *Jarman* on Wills (4); *Re Coleshead's Trusts* (5).

Mr. *Bowring*, for the children of *Thomas Carlisle*:—

These words are very different from those cases where "payable" and "receivable" have been construed to mean vesting. The meaning of the testator was, that if his daughter lived to enjoy the property personally she was to have it, but if not, then her children were to have it in her stead, but subject to the contingency of such children dying infants without issue. The testator, by the codicil, has expressly extended the period of vesting to the death of the wife: *Bright* v. *Rowe* (6); *Jones* v. *Jones* (7).

SIR R. MALINS, V.C.:—

The question raised by this will is of such frequent occurrence that it is very much to be lamented there should be any doubt upon the proper construction to be put upon, substantially, the same mode of gift with minute differences in the form of expression. The testator, at the time of making his will, having a wife, son, and daughter, gave the general residue of his estate to trustees upon trust to convert and pay the income to his wife until his daughter should attain her majority; and then to call in all invested moneys and divide the same, and all other his personal estate, between his children equally. By the codicil he referred to what he had done by the will and gave the income to his wife for her life, instead of restricting it to the minority of his daughter, and noticing that his son *John* was dead, gave his share to his sister. Taking the will and codicil together after the gift of the life interest, and leaving out the intermediate words, the disposition must be read thus: "And as soon as my daughter *Mary* shall attain her majority, then to pay all invested moneys, and all other my personal estate, to my said daughter, to whom I give and be-

(1) 16 Ves. 168.
(2) 1 Drew. 440.
(3) 16 Jur. 78.
(4) 3rd Ed. p. 742.
(5) 2 De G. & J. 690.
(6) 3 My. & K. 316.
(7) 13 Sim. 561.

queath the same accordingly." That would be an absolute gift to the daughter on attaining her majority, and then comes the clause on which the question turns: "And in case of the death of either of them (his son and daughter) without leaving lawful issue before their respective shares, estates, or interests under this my will shall be received, then upon trust to pay the estate or interest of him or her so dying unto the survivor of them; but in case either of them should die previous to the time aforesaid without leaving lawful issue," that is, before the share is received, then to his brother *John*. Now, it was very properly admitted in the argument that the word "received" must be read "receivable." Under the will the money was receivable when the daughter attained twenty-one, and the gift over is only in the event of her dying under twenty-one; and that is quite consistent. Then the codicil makes this difference, that in case the mother shall outlive the period when the daughter attains twenty-one she shall have the income during the rest of her life. The result, therefore, of the codicil is, that the trustees are still to pay to the daughter if she attains twenty-one, but to intercept her right to receive the capital until the death of her mother; that is, there is a gift to the mother for life, with an absolute bequest to the daughter on her attaining twenty-one. Therefore twenty-one is the age of vesting, and in case of the daughter's death before the legacy is received (that is "receivable"), there is a gift over to her children, that is, in case of her death under twenty-one. She attained twenty-one, but died in the lifetime of her mother, and thus the question arises. Now I consider that the rule of this Court in cases of this nature is a most reasonable one, and for the interests of society: that is, in construing a written instrument to lean to that construction by which the interest shall be vested as soon as possible. That rule is applied where there is a gift over in the event of the death of the party before the share is "payable."

It is clear that where there is an intermediate life estate to the parent no share can be actually paid whilst that parent is living, although it may be vested. But in *Hallifax* v. *Wilson* (1), where, after a life estate to the mother of the testator, there was a gift to nephews, and a gift over in the event of a nephew dying before his

(1) 16 Ves. 168.

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share became payable, it was held that one nephew having died in the mother's lifetime the share was vested—although the nephew died before it was actually capable of being paid—by reading the word "payable," "vested," and that the share, therefore, did not go over. I need not refer to the intermediate authorities, which will be found most elaborately discussed in *Re Yates's Trust* (1), and if any words could make a gift contingent the words in that case would. The difficulty there arose upon the words "entitled in possession," and the surviving daughter claimed the whole. Sir *James Parker*, a most learned Judge on such questions, followed *Hallifax* v. *Wilson* (2), and there being "no magic" in the term "entitled," held that the expression "entitled in possession" applied to an intention that there should be a vested interest, and that the representative of the daughter who died in the lifetime of her mother was entitled. In the consideration of the case of *Jones* v. *Jones* (3) by Mr. *Jarman*, there is a passage which proceeds, I think, on a most sound principle. The case of *Bright* v. *Rowe* (4) is diametrically opposed to *Hallifax* v. *Wilson*; and *Bright* v. *Rowe* is treated by Mr. *Jarman* as no longer an authority, and I have so regarded it, in my own mind, for many years. It is now settled that where there is a gift of a life estate to *A.*, with remainder to his children at twenty-one or marriage, with a gift over in the event of their dying before their shares are "payable," the gift over is construed to be in the event of their deaths before their shares become "vested." Here the question is, whether the word "received," that is "receivable," being used makes any difference? It would be ridiculous to make such a distinction. "Payable" and "receivable" mean precisely the same thing. Mr. *Glasse* was so good as to refer me to the case of *Hayward* v. *James* (5), which was not cited; but I should have come to the same conclusion quite independently of that case; because I think I ought to decide upon general principles that the words "payable" or "receivable" mean "vested," and that the gift over does not take effect. The Master of the Rolls arrived at that conclusion in *Hayward* v. *James*. I am happy to find that my view in this

(1) 16 Jur. 78.
(2) 16 Ves. 168.
(3) 13 Sim. 561.
(4) 3 My. & K. 316.
(5) 28 Beav. 523. 6 Jur. N.S. 689.

case agrees with that of the Master of the Rolls. I desire it to be understood, that I decide that in all these cases where there is a gift for life with a gift in remainder, which is to be vested at a particular age or period, and then a gift over in case of the death of the party before the legacy is "payable" or "receivable," that means before it is "vested."

For these reasons, the Plaintiff, as the representative of his late wife, is absolutely entitled, and the fund must be paid over to him. I quite agree with the decision in *Re Dodgson's Trust* (1), where it was held that the word "received" meant "receivable." The costs must be paid out of the fund.

Solicitors for the Plaintiff: Messrs. *Torr, Janeway, & Tagart.*

Solicitors for the Defendants: Messrs. *Blakely & Co;* Messrs. *Brooksbank & Galland.*

MILLER *v.* HUDDLESTONE.

Construction—Will—Abatement—Insufficient Fund.

Where a sum of £5000 was appointed upon certain trusts, subject to a power of appointing to the amount or value of £1000 each, one of which had been exercised, but the fund proved insufficient:—

Held, that the appointees of the £1000, and the persons entitled to the residue of the fund, must abate proportionately.

SARAH CRESSWICK, having a power of appointment over £5000, part of the estate of her deceased husband, by her will dated in 1842, directed her trustees to stand possessed of the said sum of £5000, and pay the income as in the will directed, and subject thereto to stand possessed of the said sum of £5000 for the persons in the will named, subject to the power of appointing the same to the amount or value of £1000, which was thereinafter given to each of her two nieces. The will contained the following power of appointment:—

"It shall be lawful for each of my said nieces, *Anne Garton Jackson* and *Sarah Maria Jackson*, by her last will and testament, to

(1) 1 Drew. 440.

V.-C. M. 1868 MILLER v. HUDDLESTONE.

appoint, give, bequeath, or dispose of any part or parts of the said trust moneys, stocks, funds, and securities (not exceeding in amount or value the sum of £1000 sterling each), to such persons and in such manner and way as she shall think fit, and from and after the decease of the survivor of them, the trustees shall stand possessed of the said moneys, stocks, funds, and securities (subject to the payment of the respective sums hereinbefore mentioned, not exceeding £1000 each) in trust for *Catharine Dutton* and *Sarah Dutton*."

The estate of the testatrix's husband proved insufficient to pay more than £1971 in respect of the said sum of £5000, and this sum was now represented by the sum of £2145 consols standing in Court in this suit, which was instituted for the administration of his estate.

One of the nieces, *Anne Garton Jackson*, by will, dated in 1848, bequeathed to her sister, the Petitioner, *inter alia*, "£1000 to which I am entitled, and of which I have the disposal under will of the late Mrs. *Sarah Cresswick*."

The present Petition was for the purpose of having the £1000 so appointed paid out of Court.

Mr. *Schomberg*, Q.C., and Mr. *Renshaw*, for the Petitioner:—

We claim the whole £1000 appointed without abatement; the gift of the fund is subject to the power of appointment as to £1000, and therefore the residue, after providing for the £1000, must bear the loss occasioned by the fund proving deficient: *Sugden* on Powers (1). The intention of the testatrix clearly was to give priority to the £1000, which was to be paid in any event.

Where a part of a fund is given as a substantive fund, and not as an aliquot part of the fund out of which it is taken, it is not subject to abatement: *Petre* v. *Petre* (2); *Booth* v. *Allington* (3), and the unreported case of *Rawlinson* v. *McMahon* there referred to; *Oke* v. *Heath* (4).

Mr. *Osborne*, Q.C., and Mr. *G. N. Colt*, for the Respondents:—

When the testatrix made her will she knew that there was a

(1) 4th Ed. p. 334; 8th Ed. p. 310.
(2) 14 Beav. 197.
(3) 6 D. M. & G. 613.
(4) 1 Ves. Sen. 135.

sum of £5000 which she had power to appoint, and expected that such sum would be forthcoming, and the intention of the testatrix being to benefit the several objects of her bounty in certain definite proportions, the appointees of the £1000 and those entitled to the residue must abate rateably: *Page* v. *Leapingwell* (1); *Wright* v. *Weston* (2); *Harley* v. *Moon* (3).

Mr. *Schomberg*, in reply.

SIR R. MALINS, V.C.:—

I think it is perfectly clear in this case, that although the testatrix intended each niece to have control over £1000, it is equally clear she intended that £3000 should be left, and that the same intention existed as to the different funds: and the question is, what the testatrix would have done had she known that instead of £5000, the fund would only have amounted to £2000. Am I to conclude that the testatrix intended that if the fund proved insufficient the nieces should take all and the other legatees nothing? I think not; but I must conclude that she intended that each niece should have power of appointing one-fifth of the whole fund, whatever that fifth might amount to.

In the case of *Rawlinson* v. *McMahon* the distinction was taken between the gift of an absolute sum and of an aliquot part of a fund; and had the testatrix given to each of her nieces £1000 out of the fund, they would have been entitled to receive that sum in full, because no intention would have been shewn as to the residue. But here the intention was to dispose of an ascertained fund of £5000, giving £1000 to each of the nieces, and £3000 to the persons entitled to the residue, and that fund having proved insufficient, the result is, that the appointees and residuary legatees must abate proportionately.

This case appears to me to come within the principle laid down by Sir *William Grant* in *Page* v. *Leapingwell*, which must be regarded as the leading authority on the question, and that case has recently been followed by the Master of the Rolls in *Wright* v. *Weston*. In that case, as in the present, the question was

(1) 18 Ves. 463. (2) 26 Beav. 429.
(3) 1 Dr. & Sm. 623.

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one of intention, and the testatrix in this case, believing that she had an ascertained fund to dispose of, and there being a deficiency in that fund, I must hold that the appointees of the £1000 and those entitled to the residue must abate proportionately.

Solicitors for Petitioner: Messrs. *C. & J. Allen & Son.*
Solicitors for Respondents: Messrs. *Kingsford & Dorman.*

CRESSWELL *v.* CRESSWELL.

V.-C. G.
1868
March 16, 17;
April 17.

Will—Attesting Witness taking Trust-legacy—Mortmain—Gift for building Parsonage—Burial-ground—Cumulative Legacy—Wills Act (1 *Vict. c.* 26), *s.* 15.

1. Testatrix bequeathed £1000 to be vested in trustees to be expended in building a parsonage in connection with *Trinity Church, Brompton.*

In 1826 land was granted for ecclesiastical purposes to the Church Building Commissioners, and on a portion of this land *Trinity Church* was built. The remainder of the land was consecrated as a burial-ground, but it had ever since the consecration been intended to reserve a portion as a site for a parsonage when funds for building could be obtained. The burial-ground had, before the date of the will, been closed by Act of Parliament, and the portion intended as a site for a parsonage had been used by the incumbents of the church as a garden:—

Held, that the bequest was good to the full extent, and not merely to the limit of £500 allowed by 43 Geo. 3, c. 108.

2. Testatrix, by a testamentary paper described as a codicil, gave "£200 to *Brompton Church*, to be disposed of as Dr. *Irons* pleases." One of the witnesses to the execution of this paper by the testatrix was the wife of Dr. *Irons*:—

Held, that as Dr. *Irons* was a mere trustee for *Brompton Church*, the bequest was not invalidated under the *Wills Act*, s. 15, by the attestation of his wife.

3. Circumstances under which repeated legacies were held cumulative and not substitutional.

Frances Cresswell, spinster, by her will, dated the 6th of December, 1859, after several pecuniary bequests (amongst others, "to my brother *William Cresswell* £3000, and to my brother *Oswald Joseph Cresswell* £3000 . . . all these to be of the stock formerly 3½ per cent., now, I believe, reduced to 3 per cent."), gave "£1000 3 per Cent. Consols to be vested in trustees (which trustees I appoint to be my executors, and the incumbent of the church of the *Holy Trinity, Brompton*), to be expended in building a parsonage in connection with that church;" and also "£1000 towards the rebuilding of the church of *Caldecote, Hunts*, of which the Rev. *J. Durley* was rector." The will contained no gift of residue.

On the 30th of December, 1865, Miss *Cresswell*, being then on her death-bed, signed and executed a testamentary instrument,

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consisting of three separate writings, marked A., B., and C., and a writing referring to and executing the same. Paper A. commenced thus:—

"£200 to *Brompton Church*, to be disposed of as Dr. *Irons* wishes.

"I wish to leave *Weedon*, *Bullock*, and *Delaway* each £200, and my housekeeper £50, and the other servants £20 each. I wish to leave each of my godchildren £100, Miss *Knipe*, my governess, £20 a year for her life, Dr. *Irons* £200.

"My brother *William* and my brother *Oswald* each £3000, Miss *Boltby* £200, Lady *Maine* £200, Miss *Fanny Paris* £200.

"I wish to leave Mrs. *Frances Cresswell* £100. The residue to be equally divided between Mr. *William* and Mr. *Oswald*. All free of legacy duty."

Paper B. was as follows:—

"Miss *Cresswell* wishes me particularly to say Dr. *Baber* is to have £300.

"*F. P. Bullock.*"

Paper C. contained a gift to the executors (named), and the paper executing A., B., and C. was as follows:—

"Dec. 30/65.

"These three papers marked A., B., C., are a true codicil to my will, and express my wishes to my executors.

"*F. Cresswell.*

"Signed in the presence of us and in the presence of each,

"*John Baber*,

"*Sarah A. Louise Irons.*"

John Baber was the Dr. *Baber* named as a legatee in Paper B., and *Sarah A. Louise Irons* was the wife of Dr. *Irons* named in Paper A.

The testatrix died on the same day.

Various questions having arisen upon the will and testamentary papers, an administration suit had been instituted.

One of these questions was as to the gift for building a parsonage, whether, having regard to the fact that there had been no actual dedication of a site for such parsonage at the death of the testatrix, the bequest was valid (9 Geo. 2, c. 36).

An inquiry having been directed upon this point (among others), by the original decree made on the 10th of March, 1866, the finding of the Chief Clerk upon this head was as follows:—

"By deed under seal, dated the 13th of April, 1826, under the authority and for the purposes of 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; 3 Geo. 4, c. 72; a piece of land in the parish of *Kensington*, containing 3 A., 2 R., was granted and conveyed to the Commissioners for building New Churches for the purposes of the said several Acts, and to be devoted, when consecrated, to ecclesiastical purposes by virtue of and according to the true intent and meaning of such Acts. The Commissioners caused a new chapel, called *Holy Trinity Church*, to be erected on a portion of the ground so conveyed to them. The remaining portion of the ground, which was intended for a burial-ground, was properly levelled and enclosed, and was in all respects made fit and ready for consecration. By an act of consecration and dedication, dated the 6th of June, 1829, the said chapel was duly consecrated and dedicated to the service of Almighty God, and the piece of ground so enclosed was assigned to be a cemetery, or burial-ground, and the same was dedicated and consecrated for that purpose. At the time of the consecration of the church and burial-ground there were no funds to erect a parsonage house, but the erection thereof was always contemplated, and a certain portion of the ground dedicated for the purpose of a burial-ground was never used for that purpose, but was by the minister and churchwarden for the time being reserved for the erection of a parsonage house when there should be funds for the purpose, and such portion of the last-mentioned piece of ground is now, and usually has been, used by the incumbent for the time being of the said church as a garden.

"At the death of testatrix a portion of the piece of land so assigned, dedicated, and consecrated for the purpose of a burial-ground had been appropriated for the building of a parsonage in connection with the church of the *Holy Trinity, Brompton*, to the extent and in the manner hereinbefore stated."

The Chief Clerk also found that *Caldecote Church, Hunts*, of which the Rev. *J. Durley* was rector, had not been rebuilt.

Other questions were, whether the legacies given by Paper A.

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were substitutional for those given by the will (in some instances for the same amount) to the same persons; and also whether Dr. *Irons*, whose wife was one of the attesting witnesses to the testamentary instrument of December 30, 1865, could take, first, the legacy to himself of £200; and, secondly, the legacy of the same amount to *Brompton Church*, to be disposed of as he wished.

Mr. *Druce*, Q.C., and Mr. *Freeling*, for the Plaintiff, *Oswald Joseph Cresswell*:—

First: The bequest for building a parsonage is bad under 9 Geo. 2, c. 36, because no land has been appropriated for the purpose, and the trust can only be carried out by buying land, as the closing of the burial-ground gives no right to use it as a site for building a parsonage: *Tatham* v. *Drummond* (1); while it is only rendered good to the extent of £500 by 43 Geo. 3, c. 108: *Incorporated Church Building Society* v. *Coles* (2); *In re Ireland's Will* (3).

Secondly: The internal evidence afforded by the gifts in one case being of stock, in the other of money, by the gift of residue, which is not contained in the will, and the description of it as a codicil by the testatrix, shew that papers A., B., and C. were a codicil, and, consequently, that the gifts contained in it were given in addition to those of the will, and not in substitution: the cases in which gifts have been held to be substitutional being those where the second instrument purported to be, and was, an imperfect second will; whereas a codicil is professedly an addition to the will, and supplements the dispositions contained in it: *Tuckey* v. *Henderson* (4); *Russell* v. *Dickson* (5); *Lee* v. *Pain* (6); *Roch* v. *Callen* (7); *Johnson* v. *Earl of Harrowby* (8).

Thirdly: The attestation of the codicil by Mrs. *Irons* renders both bequests to her husband, Dr. *Irons*, void (*Wills Act*, s. 15) while if the bequest "to *Brompton Church*, to be disposed of as Dr. *Irons* pleases," is held to be simply a bequest to the church,

(1) 34 L. J. (Ch.) 1; 10 Jur. (N.S.) 1087.
(2) 1 K. & J. 145; 5 D. M. & G. 324.
(3) 12 L. J. (Ch.) 381.
(4) 33 Beav. 174.
(5) 4 H. L. C. 293.
(6) 4 Hare, 201.
(7) 6 Ibid. 531.
(8) Joh. 425; S.C. on appeal, 1 D. F. & J. 183.

under which Dr. *Irons* takes no interest, then the gift is void for uncertainty, there being no person on whom the Court can fasten a trust, and it cannot be executed *cy-près*.

Mr. *Pearson*, Q.C., and Mr. *Markham Law*, for the executor who had proved.

Mr. *Willcock*, Q.C., and Mr. *Jolliffe*, for legatees under the will of 1859 :—

First: The bequest of £1000 for building a parsonage is valid within the *Statute of Mortmain*. There is land appropriated for the purpose of building a parsonage, which but for the consecration of the ground for purposes for which it can no longer be used, can be made use of as a site, and any application by the trustees of the £1000 in purchasing a site would be breach of trust: *Booth* v. *Carter* (1); *Trye* v. *Corporation of Gloucester* (2); *Dixon* v. *Butler* (3).

Secondly: The legacies given by the codicil, which is to be taken with the will as constituting one and the same instrument, are substitutional and not cumulative: *Heming* v. *Clutterbuck* (4).

Mr. *Karslake*, Q.C., and Mr. *A. Dixon*, for those persons who were named as legatees under the codicil, and not under the will :—

The legacies given by the will are demonstrative, and the gift of residue is inconsistent with the notion of giving the brothers of the testatrix, *William* and *Oswald*, legacies out of the stock, and also the same amount by the codicil out of the general estate. There is nothing in the *Wills Act*, s. 15, to invalidate the gift to Dr. *Irons* for the benefit of *Brompton Church*, in the circumstance that Mrs. *Irons* was one of the attesting witnesses.

Mr. *Druce*, in reply.

Apr. 17. SIR G. M. GIFFARD, V.C. :—

In this case several questions were raised on the will and codicil of Miss *Cresswell*. Some of these questions were admittedly too plain for argument, as for instance :—First: That *Francis Patten-*

(1) Law Rep. 3 Eq. 757.
(2) 14 Beav. 173.
(3) 3 Y. & C. Ex. 677.
(4) 1 Bli. (N.S.) 479.

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son Bullock and *Charlotte Cripps*, having been attesting witnesses to the will, could take nothing beneficially under the will, and that Dr. *Barber* and Mrs. *Irons* having been attesting witnesses to the codicil, neither Dr. *Barber* nor Dr. *Irons* (who is the husband of Mrs. *Irons*), can take the legacies given to them beneficially by the codicil. Secondly: That the legacies, as distinguished from the residue in that part of the codicil which consists of the paper marked A., are free from legacy duty. Thirdly: That the stock legacies in the will are not specific. Fourthly: That the £1000 given towards the rebuilding of the church of *Caldecote, Hunts*, is a good legacy. And fifthly: That from this and all the other charitable legacies of every description, whether the Church Building Acts do or do not apply, there has to be deducted the amount which the leaseholds would have had had to contribute towards such charitable legacies respectively in an ordinary course of administration, but for the Act of *George* II. The result is, that there remain three questions to be disposed of. The first is, as to the legacy in paper A., which is in the following terms:—"£200 to *Brompton Church*, to be disposed of as Dr. *Irons* wishes." The second, as to the legacy in the will, which is in the following terms:—"I give £1000 3 per Cent. Consols, to be vested in trustees (which trustees I appoint to be my executors, and the incumbent of the church of the *Holy Trinity, Brompton*), to be expended in building a parsonage in connection with that church." And the third is, as to whether the legacies given by the papers of which the codicil consists, or any of them, are substitutional or cumulative.

With respect to the first of these questions, the only difficulty which arises is in consequence of Mrs. *Irons* having been an attesting witness to the codicil, I cannot, however, look on this legacy as a legacy which is struck at by the 15th section of the *Wills Act*. The legacy which is given to Dr. *Irons* beneficially this section does annul, but not that which is given "to *Brompton Church* to be disposed of as Dr. *Irons* wishes." *Brompton Church* was built under the Church Building Acts referred to in the certificate. Dr. *Irons* is a trustee for the purpose of directing the disposition of the legacy, and it may be disposed of as he may direct in the repair, improvement, enlargement, or ornamentation of *Brompton Church*, but not for his personal benefit.

With respect to the second question, there was a reference in the decree to inquire whether at the death of the testatrix any land had been appropriated to or for the building of a parsonage in connection with the church of the *Holy Trinity, Brompton.* [His Honour referred to the finding of the Chief Clerk set out in the statement.]

It appears from the evidence that the substance of these facts was known to the testatrix. The burial-ground has for some years been closed by Act of Parliament; in fact, before her death, and no further burials can lawfully take place there. Under these circumstances is the legacy valid only, under the Church Building Acts, to the extent of £500, as in the case of *In re Ireland's Will* (1), or is it valid to the full amount; less of course in either case by the amount which has to be deducted in respect of the leaseholds? The two leading cases which apply to bequests of this description are *Philpott* v. *St. George's Hospital* (2), and *Tatham* v. *Drummond*, before Lord *Westbury* (3). The proposition to be deduced from the first of these cases is, that a bequest of the kind would be good, provided the land on which the building is to be erected cannot, consistently with the terms of the trust, be acquired by means of any portion of the bequest, but either has been or is to be lawfully dedicated for the purpose. The proposition to be deduced from the second is, that the Court will not alter its conception of the purposes of a testator merely because those intentions happen to fall within the prohibitions of the *Statute of Mortmain.* The point, therefore, for present decision is, whether the terms of the bequest, regard being had to the circumstances which existed at the time of the death of the testatrix, are such as to exclude a purchase of land by the trustees out of the bequest, or any part of it, for the purpose of building a parsonage in connection with the church. The facts which existed at the time of the death of the testratrix I have already read from the certificate. They were known to her, and when she died no further burials could take place in the churchyard; either therefore the land referred to could be used for the purpose of building a parsonage, or for no purpose of any description. With its appropriation for the purpose

(1) 12 L. J. (Ch.) 381. (2) 6 H. L. C. 338.
(3) 10 Jur. (N.S.) 1087.

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of building a parsonage it is probable that no Attorney-General would sanction any proceedings to interfere, and even if he did I am of opinion that this Court most assuredly would grant no injunction. The bequest points to a parsonage in connection with the church, and there having been at the death of the testatrix land appropriated for that purpose which could be lawfully so used, I am of opinion that the trustees would not have been justified in purchasing or attempting to purchase any other land for that purpose. Upon these grounds, therefore, the bequest is good, excluding from it only the leasehold contribution.

With respect to the third question it could not, of course, be denied that if a legacy, even of the same amount to the same person, be repeated in two separate testamentary instruments, such as a will and codicil, *primâ facie* the legatee is entitled to both legacies; but it was argued that the latter instruments were on the face of them substitutional, on the principle of *Tuckey* v. *Henderson* (1), and the cases there cited, and the words "I wish to leave," and "these three papers express my wishes to my executors," were relied on. There is, however, a broad distinction between *Tuckey* v. *Henderson*, and cases of that class, and the present, for in those cases the second instrument did not purport to be a codicil. In *Tuckey* v. *Henderson* the Master of the Rolls, speaking of the second instrument, said:—"This differs from the case of a codicil; a codicil is professedly an addition to a will, but this is professedly a substitution for it."

Now what we have here in the instrument of the 30th of December, 1865, referring to the three instruments marked, A., B., and C., is this:—"these three papers marked A., B., and C., are a true codicil to my will, and express my wishes to my executors." The instruments, therefore, are meant to express the testatrix's wishes, "as a true codicil to my will." The will is referred to, the codicil is in terms made an addition to it, and therefore is not substitutional. This being so, are there any particular legacies which can be deemed substitutional? I am of opinion that there are not. The housekeeper (who witnessed the execution of the will) is excluded from the will by the *Wills Act*. The words "I wish to leave," cannot for this purpose differ in effect from "I leave." The

(1) 33 Beav. 174.

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bequests to the godchildren in the will and in the codicil are very different, and so are the bequests to the two brothers. *Russell* v. *Dickson* (1) is a very different case to the present, and need not be commented on. In *Johnson* v. *Earl of Harrowby* (2), the general rule was admitted to be applicable, and I can see no sufficient reason for which this case can be considered as one which forms an exception to it; exceptions to a plain general rule of law ought not to be made on slight or refined, or otherwise than plain grounds. The legacies, therefore, must be taken to be cumulative, and not substitutional.

Solicitors: Messrs. *M. & F. Davidson;* Messrs. *Smith, Guscotte, & Wadham.*

V.-C. G. 1868 *April* 25, 30.

In re LONDON AND PROVINCIAL STARCH COMPANY.

GOWERS' CASE.

Company—Contributory—Fraud—Collusive Forfeiture—Register of Shareholders—Costs.

Fifty shares in a company were registered in the joint names of a father and son on their application, and they paid £150 by way of deposit and allotment money. Shortly afterwards a call of £2 a share was made. The father became a director, and having, as he said, discovered that the company was formed under circumstances of gross fraud, wrote to the chairman, warning the directors against involving the shareholders in any fresh liability. Shortly after he resigned his seat as director. Two months afterwards (the call being unpaid) the father wrote to the chairman, requesting the directors to declare the shares forfeited; and said that he and his son must be satisfied that their names were taken off the register. A resolution was thereupon passed that the shares be forfeited; but the names were not removed from the register of shareholders, and were on it when the winding-up order was made more than a year afterwards. No steps were taken on one side to enforce the call, or on the other to recover the deposit and allotment money.

Upon summons by the official liquidator, that the names might be settled on the list of contributories:—

Held, that the so-called forfeiture of shares was void; and that the Respondents must be settled on the list of contributories.

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(1) 1 H. L. C. 293.

(2) Joh. 425; S. C. on app. 1 D. F. & J. 183.

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The costs of a contest by a person disputing his liability to be a contributory, and failing, must, except under special circumstances, be paid by such contributory.

THIS was an adjourned summons on behalf of the official liquidator, that the names of *John Gower*, senior, and *John Gower*, junior, might be settled on the list of contributories.

The *London and Provincial Starch Company* was registered on the 14th of February, 1865. In August, 1865, the two Messrs. *Gower* applied for fifty shares of £10 each in the company, which were allotted to them, and registered in their joint names on the 8th. They paid £1 a share on application, and £2 on allotment—£150 altogether.

On the 26th of September a call was made of £2 per share.

On the 3rd of October, Mr. *Gower*, senior, was elected a director, and attended three board meetings. On the 14th of November, he wrote to the chairman of the directors a letter, which contained the following passages :—

"Having accepted a seat in the direction of this company, by the solicitation of one of your members, and by a formal vote of your board, during the past month, at my earliest possible opportunity, I have sought to make myself acquainted with the position and prospects of the company, and especially with the mode in which the business of the company has been conducted. This being the third board meeting I have been able to attend, and the first since I have been sufficiently acquainted with your affairs to enable me to give a decided opinion as to the prospects of the company, I now deliberately warn you against involving the shareholders in any further liability, and do earnestly advise that immediate steps be taken to relieve them from any contemplated outlay."

He was then requested to furnish the directors with written particulars of his complaints; and on the 22nd of November he did so.

On the 24th of November he wrote to resign his office of director. Accompanying this resignation was a letter from Messrs. *Gowers'* solicitor, enclosing the same, and stating that inasmuch as the Messrs. *Gower* had been induced to apply for and accept the shares on representations which were wholly untrue, he had advised a repudiation by them of the shares in question, and they would

seek to recover back the money paid. The resignation of Mr. *Gower*, senior, was accepted on the same day, and entered in the company's minutes.

On the 9th of January, 1866 (the call not having been paid), Mr. *Gower*, senior, wrote to the chairman, saying, that having considered the circumstances, he and his son were desirous of avoiding any course which might be damaging to any future prospects of the company, but they requested the directors to use the power with which the articles of association invested them, to declare the shares forfeited. He said, "It must, of course, be fully understood that in thus making a sacrifice, and relinquishing any claim of profit from the future working of the concern, we must be satisfied that our names are taken off the register of shareholders;" and added, "we thus propose to retire from the company without having spoken to a single shareholder beyond the members of the board."

Letters followed, and on the 15th of January the secretary wrote to say that unless the call were paid by one o'clock on the following day the shares would be forfeited. On the 16th the following resolutions were passed by the directors:—

"Resolved, that the shares held by Messrs. *Gower*, from No. 195 to 224, upon which £150 has been paid, be forfeited."

"Resolved, that in the interest of the company Messrs. *Gower* shall not be asked or compelled to pay the call now due in respect of such shares, but be released from such payment."

An action to recover the £150 had been threatened by Messrs. *Gower*, but had never been commenced.

The names of the Messrs. *Gower* had not been removed from the list of shareholders, and were on it when the winding-up order was made, on the 3rd of June, 1867.

Clause 25 of the articles provided that, notwithstanding forfeiture, the member should be liable to pay to the company all calls due upon the shares at the time of the forfeiture.

In his cross-examination, Mr. *Gower*, senior, said he had come to the conclusion in November, 1865, that the company had been formed under circumstances of gross fraud.

Mr. *Kay*, Q.C., and Mr. *J. N. Higgins*, for the official liquidator:—

The letter of the 9th of January shews that the whole proceed-

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ing was a device to get rid of Messrs. *Gowers'* liabilities, not for the benefit of the company, but for their benefit: *Richmond's Case and Painter's Case* (1); *Stanhope's Case* (2).

The directors had no power (Article 25) and no right to abandon the claim of the company for the call moneys; it was not competent to them to indemnify a shareholder; and their conduct was a gross dereliction of duty: *Companies Act*, 1862, sect. 32; *Martin's Case* (3).

The register all along shewed that Messrs. *Gower* were members of the company; so that, in any event, the alleged forfeiture was bad as against creditors: *Lawrence's Case* (4).

Mr. *Druce*, Q.C., and Mr. *Brooksbank*, for the Messrs. *Gower*:—

Brotherhood's Case (5), one of the *Agriculturist Cattle Insurance Company's* cases, which was never appealed, is in our favour. So is *Lord Belhaven's Case* (6), which was appealed. In all the others there was a difference.

It is monstrous on the part of the official liquidator to treat this as a case of fraud. We complain that we were induced to join a bubble company. Directly we found out our position, we refused to pay another farthing. The directors were unwilling to take steps to recover the call, and we were ready to forego our action for the deposit and allotment moneys. It was a fair compromise: *Knight's Case* (7).

It was not incumbent on Mr. *Gower*, senior, to communicate to others the impression which he had formed; and his convictions as to the illegality of his contract with the company were afterwards shaken. The arrangement was considered to be a beneficial one for the company at the time; and the present creditors have no right to interfere: *Blake's Case* (8); *Woollaston's Case* (9).

SIR G. M. GIFFARD, V.C.:—

There are very short grounds on which I shall dispose of this case.

(1) 4 K. & J. 305, 325.
(2) Law Rep. 1 Ch. 161, 168.
(3) 2 H. & M. 669.
(4) Law Rep. 2 Ch. 412.
(5) 31 Beav. 365.
(6) 3 D. J. & S. 41.
(7) Law Rep. 2 Ch. 321.
(8) 34 Beav. 639.
(9) 4 De G. & J. 437.

What might have been the result if these gentlemen had got their names removed from the list of shareholders on the ground of fraud, before the winding-up order was made, I am not prepared to say. But they allowed themselves to be treated as shareholders by permitting their names to remain upon it; and the transaction as between them and the directors of the company was this: The secretary of the company wrote a letter, stating that unless the call were paid by one o'clock on the following day, the shares would be forfeited. But non-payment of the call was not the real ground of the forfeiture. The truth was, that these gentlemen alleged fraud, and were (as they believed) in a position to prove fraud; and the so-called forfeiture was a mere machinery for enabling them to get rid of their liability to the company.

The consequence is, that their names must be settled on the list of contributories.

Mr. *Kay* asked that the Messrs. *Gower* might be ordered to pay the costs of the application.

Mr. *Druce, contrà,* said the rule was established the other way.

The VICE-CHANCELLOR said he saw no reason why the ordinary rule, that a party failing must pay the costs, should not apply in this class of cases; and if on a future day counsel for the official liquidator could produce a precedent of such an order having been made, His Honour would follow it. He said that, not treating the application as in the nature of an appeal, but simply as an adjournment from Chambers.

April 30. Mr. *Kay,* Q.C., mentioned the matter to-day, and produced the authority of *Barry's Representatives' Case* (1).

Mr. *Brooksbank, contrà,* referred to *Mallorie's Case* (2); *Gregg's Case* (3); *Fletcher's Case* (4); *Purdey's Case* (5).

SIR G. M. GIFFARD, V.C.:—

On the former occasion I said that if an authority could be produced by the official liquidator I would follow it. Such an authority

(1) 2 Dr. & Sm. 321.
(2) 15 W. R. 52.
(3) 15 W. R. 82.
(4) 16 Ibid. 75.
(5) 16 W. R. 660.

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has been produced; and I may add that I think it right that, where a contributory raises a contest of this kind, he should, except under very special circumstances, pay the costs of the application.

In this instance I shall certainly act upon the decision of Vice-Chancellor *Kindersley*, and order the Messrs. *Gower* to pay the costs of the official liquidator. The order will be dated to-day.

Solicitors for the Official Liquidator: Messrs. *Lewis, Munns, Nunn, & Longden.*

Solicitor for the Messrs. *Gower:* Mr. *Chapple.*

V.-C. G. 1868 *April* 18, 25; *June* 12.

In re INNS OF COURT HOTEL COMPANY.

Company—Power of borrowing—Debentures—Issue of Debentures to Creditors in discharge of Debts—Composition with Creditors—Contemplation of Bankruptcy by a Company—Pressure—Fraudulent Preference—Companies Act, 1862, *s.* 164.

L.R. 6 20 Eq 341

Debentures issued by a company under a general power of borrowing, in part discharge of existing debts are valid.

A company, whose directors were empowered to issue debentures, and to borrow money "upon mortgage or otherwise," issued mortgage debentures. Some of these were issued in fulfilment of contracts with tradesmen, whereby they agreed to furnish goods to the company on being paid partly in cash and partly in debentures. Others were issued to the tradesmen as security for their cash balances. Others were issued on the 18th of October in pursuance of an arrangement come to on the 29th of the previous September, whereby the company agreed to pay the creditors 5*s.* in the pound in one month, 5*s.* in the pound in the following January, and the remaining 10*s.* in debentures. The only dissentient creditors came into the arrangement on the 29th of October, but on that day a winding-up Petition was presented, and they did not receive any debentures. A voluntary winding-up, under a resolution passed on the 10th of November, was afterwards continued under supervision:—

Held, that the debentures respectively were not invalidated, either by reason of their having been issued in part satisfaction of existing debts, or by the failure of the arrangement of the 29th of September, or on the ground of fraudulent preference under the *Companies Act*, 1862, s. 164; and that they were all valid mortgages.

Circumstances which amount to fraudulent preference considered.

THIS was a summons, adjourned from Chambers, to try the validity of certain debentures which had been issued by a limited company.

V.-C. G. 1868 *In re* INNS OF COURT HOTEL CO.

The *Inns of Court Hotel Company, Limited,* were incorporated on the 9th of January, 1863, with a capital of £100,000, in 10,000 shares of £10 each. The 53rd article of association, so far as material, was as follows:—

"The directors shall, subject to the powers of the general meetings, have the entire management of the company; and they shall have power . . . . to incur debts in the ordinary course of business; and to issue debentures, bills of exchange, and promissory notes, and to borrow any amount not exceeding £60,000 upon mortgage or otherwise."

The share capital of the company was, with the exception of a very small amount, subscribed for and fully paid up.

At an extraordinary general meeting, held on the 29th of November, 1864, a resolution was passed authorizing the directors to borrow a sum not exceeding £20,000 upon mortgage or otherwise, in addition to the sum of £60,000 which they were empowered to borrow by the 53rd article. This was afterwards duly confirmed as a special resolution.

The directors, in exercise of the power thus conferred on them, borrowed upon the security of debentures "of the first issue," £79,930.

At another extraordinary general meeting, held on the 30th of November, 1865, the following resolution was passed:—

"That in place of the new regulation which authorized the directors to borrow any sum not exceeding £20,000 upon mortgage or otherwise, the following new regulation should be inserted in the articles of association of the company, viz.:—

"The directors shall have power to borrow any sum not exceeding £70,000 upon mortgage or otherwise, in addition to the sum which they are empowered to borrow by the 53rd article of association." At another meeting held on the 21st of December, 1865, this resolution was also confirmed.

In exercise of this additional power the directors borrowed on the security of debentures "of the second issue," £12,896. It was with regard to the several classes of debentures of this second issue that the present contention was raised. They were distributed, for the purposes of the argument, into five classes.

Class 1 were issued for cash advanced at the time.

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Class 2 were, under a power in the articles, issued to the directors as a remuneration for their services.

Class 3 were issued to tradesmen under contracts for the supply of goods, to be paid for part in cash, and part in debentures.

Class 4 were issued to tradesmen by way of security for balances payable in cash for goods supplied.

Class 5, consisting of debentures to the amount of £6631, were issued on the 18th of October, 1866, to creditors pursuant to an arrangement come to on the 29th of September, when the company, being in difficulties, proposed to pay 5s. in the pound in one month, 5s. in the pound in the following January, and to secure the remaining 10s. by debentures redeemable in twelve months; which proposal was accepted by all the creditors present at the meeting, except Messrs. *Hill & Keddell*, the builders. These debentures for £6631 were indorsed to the effect that they were issued as security for carrying out the arrangement proposed on the 29th of September.

On the 29th of October a Petition for winding up the company was presented to the Master of the Rolls, and another with the same object was presented on the 31st of October to Vice-Chancellor *Wood*. On the 10th of November a resolution was passed that the company should be wound up voluntarily, and on the 19th of November Vice-Chancellor *Wood* ordered that the voluntary winding-up should be continued under supervision.

On the 30th of May, 1867, articles of agreement were entered into between the *Inns of Court Hotel Company, Limited*, by its liquidators, *Nichols*, and *Bewley*, of the one part, and the *Lincoln's Inn Fields Hotel Company, Limited*, of the other part. The deed recited the second issue of debentures to the amount of £12,896, that no default was made in payment of the principal and interest of the said debentures before the winding-up, and that "several of such debentures were not issued to persons who advanced money to the company on security of the said debentures, but were issued to creditors of the company in respect of just debts;" also that the liquidators proposed to submit to the determination of the Court of Chancery "whether and which of the debentures of the second issue constitute a valid charge on the said hereditaments and premises; and that the *Lincoln's Inn Fields Hotel Company* had agreed

with the liquidators to buy all their estate and interest in the hereditaments, good-will, furniture, fixtures, and effects of the *Inns of Court Hotel Company*, subject to certain mortgages, and to the debentures of the first issue; and "subject also to such of the debentures of the second issue (if any) as the Court of Chancery shall consider to be valid," and contained stipulations by which the amount of the purchase-money was made to depend on the validity of the second issue of debentures, and a sum was deposited by the new company to abide the decision of the Court.

In a joint affidavit of the liquidators, Messrs. *Nichols* and *Bewley*, filed on the 30th of May, 1867, Mr. *Bewley*, formerly the secretary of the *Inns of Court Hotel Company*, deposed, amongst other things, as follows: that all the creditors of any considerable amount agreed to the terms of the arrangement of the 29th of September, 1866, except the builders, Messrs. *Hill & Keddell*, who were simple contract creditors to the amount of £15,000 and upwards; and that negotiations were in progress with them, which ended in their accepting the same terms as the other creditors on the 29th of October, 1866, but on that very day the winding-up Petition was presented. Meanwhile the other creditors were preparing for the completion of the arrangement of the 29th of September, and the directors, on the 18th of October, 1866, issued the debentures to the amount of £6631 above mentioned; but the negotiation with the builders was then in progress, the directors were in reasonable hopes of being able to carry out the arrangement, and there was no threat of an immediate winding-up. He said that the debentures were not issued in order to create any undue preference, but simply to secure the carrying out of the agreement with the consenting creditors.

In answer to this, Messrs. *Hill* and another, in a joint affidavit filed on the 8th of June, 1867, set forth a letter written by the solicitor of the firm of *Hill & Keddell* to Mr. *Bewley*, dated the 14th of July, 1866, in which they threatened, in the event of a sum of £1000 being not paid, and extra works not being measured up within a week, to discharge their workmen on the following Saturday, remove their plant, and forthwith present a winding-up Petition. They said they never consented to the issue of the debentures of the 18th of October; no debentures were given to them; and not

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until the 4th of April, 1867, were they aware that debentures had been issued to creditors to secure payment of the company's debts.

In reply, Mr. *Bewley*, by an affidavit sworn in June, 1867, said that after certain measures had been settled with the architect and the managing clerk of Messrs. *Hill & Keddell*, he heard nothing more of the threat to wind up the company, and was repeatedly assured by the managing clerk that the builders had no intention whatever to file a Petition for the purpose. No debentures were issued to the builders because they refused to accept any.

On the 25th of June, 1867, Vice-Chancellor *Wood* made an order approving of the above conditional contract for sale, subject to the rights of the debenture holders of the second issue, and directing the same to be carried into effect. On the 18th of December, 1867, this summons was taken out, being an application on behalf of the liquidators, in the following terms: "to proceed on the order dated the 25th day of June, 1867, as to whether the debentures of the second issue referred to in the conditional contract dated the 30th day of May, 1867, made between the said company of the one part, and the *Lincoln's Inn Fields Hotel Company, Limited*, of the other part, or any of them, constitute a valid charge on the hereditaments and premises in the said contract mentioned, and which contract, subject to the rights of the debenture holders as therein provided, has been ordered to be carried into effect."

The argument was, by consent, confined to Class 5 of the debentures.

Mr. *Swanston*, Q.C., for the liquidators:—

If these debentures are valid charges on the assets of the old company, the new company will have to pay us so much the less; if they are invalid, they will have to pay us so much the more.

Taking the last, or fifth class, first, we say that these debentures are clearly invalid; first, as forming part of an inchoate arrangement which was never carried out; and, secondly, because they were issued in contemplation of insolvency. The scheme was abortive, because the creditors did not all assent; but the arrangement itself was made "in contemplation of bankruptcy."

We further say that the directors had no authority to issue debentures, except for cash advances.

Mr. *A. Smith*, for Messrs. *Hill & Keddell*, the builders:—

Our debt, which is by far the largest, was contracted by the old company, and it is our interest to contend that all debentures of the second issue are invalid as charges on the property.

We therefore adopt the liquidators' argument, and contend that an authority to borrow does not warrant the issue of debentures, except to secure money lent: *Lindley* on Partnership (1).

Mr. *Key*, for the *Lincoln's Inn Fields Hotel Company*.

Mr. *Rowcliffe*, for the debenture holders of the second class.

Mr. *C. T. Simpson*, for some of the creditors who had taken debentures of the fifth class:—

I dispute the proposition that a power to borrow conferred by special resolution does not authorize the issue of debentures. The passage from Mr. *Lindley's* book does not mean that debentures may not be issued for good and valuable consideration. The case on which the passage is founded is *West Cornwall Railway Company* v. *Mowatt* (2), which does not go to the length contended for.

The inchoate agreement was one which the parties had good grounds for supposing would have been successful notwithstanding the panic, and the event shewed that the company might have stopped all proceedings by their creditors if they could have arranged with the builders. It was only Messrs. *Hill & Keddell* who prevented the arrangement from being carried out.

As to fraudulent preference, the sole question is, what was the intention of the bankrupt in giving the security. If it was given in order that the creditor might receive more than his share in the event of bankruptcy supervening, it is fraudulent. The effect of pressure in legalizing the payment is only that it rebuts the presumption of an intention on the part of the debtor to act in fraud of the law, from which fraudulent intention alone arises the invalidity of the transaction: *Bills* v. *Smith* (3).

(1) 2nd Ed. p. 276. (2) 12 Jur. 407.
(3) 34 L. J. (Q.B.) 68, 71.

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Even the fact that the creditor who exercises the preference knows that the debtor is in difficulties makes no difference; the sole question is intention: *Griffith* on Bankruptcy (1), citing *Davison* v. *Robinson* (2).

Mr. *Davey*, for the debenture holders of the third and fourth classes.

Mr. *Swanston*, in reply:—

There are three distinct grounds why the fifth class of debentures ought to be held not a valid charge on the hotel premises.

First: The issue of these instruments amounted to a fraudulent preference. The question whether certain acts do or do not amount to a fraudulent preference is always one for a jury. This is the first instance of an application of the doctrine to the acts of a company.

The *Companies Act*, by sect. 164, in the most express manner embodies the old bankrupt law; and according to the old law the question always was, "Did the debtor contemplate insolvency?" How is this test to be modified when it comes to be applied to a company? It seems difficult to impute to a company the contemplation of anything. I submit that the true test must be the existence of such a state of things at the time as a Judge, or any impartial man acquainted with the company's affairs, would consider to be a state of insolvency. If that be the test, there can be no doubt of the contemplation of insolvency in this case. The proposal was to pay in instalments; which was as much as to say, we cannot pay in full. A composition deed by an individual would be an act of bankruptcy. Nor was there any pressure here to rebut the presumption of fraudulent preference.

Secondly: the debentures were issued as part of an inchoate agreement which was never completed. The builders would not come in. The debentures ought to have been issued contemporaneously; and to insist upon debentures actually issued in pursuance of an arrangement which became abortive, is inequitable. Suppose that under a composition deed, certain creditors having received their composition, others were not paid; it would be a fraud for the latter to retain what was paid to them.

(1) Page 428. (2) 3 Jur. (N.S.) 791.

Thirdly: the company were empowered to borrow upon mortgage or otherwise. Such a power does not authorize a company to issue debentures for the purpose of securing existing debts, according to the *dictum* of the Master of the Rolls in the analogous case of mortgages: *Scott* v. *Colburn* (1).

SIR G. M. GIFFARD, V.C.:—

A question has been raised in this case as to the validity of certain debentures which have been issued by the company, and the grounds are three; the first ground being upon the terms of the resolution, and the nature of the debentures which were issued.

Now the resolution was a resolution authorizing the borrowing of money, and the company had no express power of issuing debentures, except for moneys actually advanced. There were some creditors who had actually furnished goods to the company, and the arrangement with them was, that a portion of their respective debts should be paid in cash, and a portion in debentures.

I think it would be going too far to say that where a *bonâ fide* creditor has a debt existing to the extent of the debentures which he has taken, he is not to be considered to be in the same situation as if he had made a loan to the company. I think the opposite contention fails. It is not borne out by the case of the *West Cornwall Railway Company* v. *Mowatt* (2). The latter case turned upon the fact of one of the directors having some interest in the contract, which was consequently void. I do not see how a distinction can be drawn between the case of a creditor having simply given a cheque, and received a debenture, and the case where a sum of money which is actually due to the creditor has been turned into a loan to the company. Therefore I think that ground fails.

Then it was said that the issue of these debentures formed part of an inchoate agreement. But at the time when the debentures were issued there had been a meeting of creditors, and it was supposed they would all come in; and each separate creditor received cash, and took debentures which extinguished his separate debt. Therefore that ground of objection fails also.

(1) 26 Beav. 276, 281. 5 Jur. N.S. 183. (2) 12 Jur. 407.

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Then we come to the third ground, that of fraudulent preference. Though a company is insolvent, it is not every act of the company which will amount to a fraudulent preference. There must be a contemplation of bankruptcy, that is to say, of a winding-up; and there must be absence of pressure. Now, it is sworn in the affidavit of the secretary that at this period he heard nothing more of the previous threat of an immediate winding-up. And the very nature of the transaction shews what was in the contemplation of the parties, and that the object and purpose of the whole scheme was to provide that there should not be a winding-up. At that time there were reasonable grounds for supposing that the concern would turn out prosperously; and so far from the arrangement being in contemplation of a winding-up, the object of it was to put a *bonâ fide* restriction upon the creditors, in order to prevent their enforcing their legal rights against the company, and to enable the company to proceed with its business.

I am of opinion, therefore, that these debentures are valid; and the sum deposited under the contract will, therefore, be paid out to the new company.

Solicitors for the Liquidators: Messrs. *Reed, Phelps, & Sidgwick.*

Solicitors for the Respondents: Messrs. *Stone, Townson, & Morris;* Messrs. *Hensman & Nicholson;* Messrs. *Gregory, Rowcliffes, & Rawle*; Messrs. *Johnston & Jackson*; Messrs. *Bircham, Dalrymple, & Co.*

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May 6, 7.

Company—Amalgamation—Companies Act, 1862, *s.* 161—*Notice, Requisites of—Acquiescence.*

In order to bring a transfer of the business of one company to another company within the provisions of sect. 161 of the *Companies Act*, 1862, the circular convening the meeting at which the transaction is to be submitted to the shareholders must contain distinct notice that the arrangement is to be carried out by the liquidators under sect. 161.

An arrangement for the transfer of the business of company *A.* to company *B.*, by which, in addition to having their liabilities per share raised from £50 to £100, the shareholders of company *A.* can only obtain shares in company *B.* upon payment of £6 premium per share, is not a valid sale or arrangement within the provisions of sect. 161.

Acquiescence, to bind all the members of a company to a bargain which there is no power to confirm, must be acquiescence by every member of the company.

THIS was a bill by the *Imperial Bank of China, India, and Japan, Limited, R. M. Martin,* and *J. B. Higgs,* for the purpose of setting aside an agreement of the 24th of August, 1864, and an amalgamation, or sale and transfer, of the business of the Plaintiff company to the *Bank of Hindustan, China, and Japan,* as inoperative and void as against the Plaintiff company, or, at all events, the Plaintiffs *Martin* and *Higgs,* and, if the Court should think fit, also as against the other non-assenting shareholders of the Plaintiff company.

The *Imperial Bank of China, India, and Japan,* was established for the purpose of transacting banking business in this kingdom and in the East, and elsewhere, and was registered under the *Companies Act*, 1862, on the 22nd of April, 1864, as a company limited by shares, with a nominal capital of £2,000,000, divided into 40,000 shares of £50 each, of which 20,000 only were issued. The 62nd clause of the articles of association gave the directors power, amongst other things, to "amalgamate with any company carrying on business within any of those objects (the objects of the company as stated in the memorandum of association), or with any bank, or

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financial or exchange business," and to "pay for any property or rights acquired by the company in money or shares, or partly in one mode and partly in the other," and to "sell, exchange, or otherwise dispose of, absolutely or conditionally, or for any limited interest, any of the property or contracts of the company upon such terms as they may think fit, and accept payment of any money due to the company in shares or otherwise." The *Bank of Hindustan, China, and Japan, Limited*, was a duly registered company carrying on business with objects similar to those of the *Imperial Bank* and having a nominal capital of £1,000,000, divided into 10,000 shares of £100 each, with power to increase such capital to £2,000,000. No business was ever carried on by the *Imperial Bank*, and towards the end of June, 1864, negotiations were commenced for an amalgamation with the *Bank of Hindustan*. On the 28th of July, 1864, a circular was addressed by the directors of the *Imperial Bank* to their shareholders, stating that "the negotiations which have some time past been pending with the *Bank of Hindustan*, having for their object an amalgamation with that very prosperous institution, have now been brought to a successful issue," and that as early as practicable, in accordance with the articles of association, an extraordinary general meeting of both companies would be convened to confirm the arrangements made by the directors, previous to which meeting all details of terms would be laid before the shareholders.

Accordingly on the 10th of August, 1864, another circular was issued by the directors of the *Imperial* to their shareholders, giving notice in the following terms:—

"With reference to the circular addressed to the shareholders on the 28th of July last, I have now to inform you that an extraordinary general meeting of the shareholders of this bank will be held at the *London Tavern, Bishopsgate Street*, on Thursday the 25th inst. at 12 o'clock precisely, when the agreement entered into with the *Bank of Hindustan, China, and Japan, Limited*, will be submitted for approval, and resolutions to voluntarily wind up the bank and appoint liquidators will be proposed. The following are in substance the terms of amalgamation, viz.:—

"1. 20,000 new shares of £100 each of the *Bank of Hindustan* to be issued to the holders of the 20,000 shares in this bank.

"2. Such shares to be issued at £6 per share premium.

"3. £5 per share of the premium to be placed to the reserve fund of the united bank, in addition to the amount already at the reserve of the *Bank of Hindustan*, and also all further additions, by which the total reserve fund at the end of this year will, with the profits, probably amount to £160,000.

"4. The remaining £1 per share of the premium will be applied to pay off preliminary expenses.

"5. A dividend of £10 per cent. per annum, free of income tax, from the time the bank has been in operation, to be paid to the shareholders of this bank on exchanging certificates.

"6. Four directors from this bank to be nominated by and join the board of the *Bank of Hindustan*.

"7. The new shares now to be issued as above to rank on equal terms as all the previous issues of the *Bank of Hindustan*, whether original or otherwise.

"8. The option of paying up to £25 per share, under discount at £6 per cent. per annum, is also reserved to the shareholders."

The meeting was held on the 25th of August, 1864, and resolutions were passed:—1. Approving the agreement dated the 24th of August, between the *Bank of Hindustan* and the *Imperial Bank*, and authorizing the directors (of the *Imperial*) to affix the seal of the company thereto; 2. For winding up the company voluntarily; 3. Appointing three of the directors liquidators for the purpose of winding up the affairs of the company and distributing the property, and authorizing them to receive in compensation or part compensation for the business and property in the *Imperial*, shares in the *Bank of Hindustan*, upon the terms specified in the agreement: if any member should express his dissent from this resolution by a notice in writing to the liquidators not later than seven days after the meeting, and should require the liquidators to purchase the interest of such dissentient member, the liquidators should raise the purchase-money to be paid to such dissentient member.

These resolutions were confirmed at another extraordinary general meeting of the *Imperial Company* held on the 12th of September, 1864, the notice by which this subsequent meeting was convened stating *in extenso* the resolutions passed on the 25th of August.

At meetings of the *Bank of Hindustan* held on the same 25th

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of August, and 12th of September, resolutions were passed approving the agreement with the *Imperial Bank*; for increasing the capital by the creation of 20,000 new shares of £100 each, to be issued at £6 per share premium to the persons and upon the terms mentioned in the agreement, and for adding to the board four directors to be selected from the board of the *Imperial*.

Pursuant to the agreement the assets of the *Imperial Bank* were handed over by the liquidators to the *Bank of Hindustan*, and the great majority of the *Imperial* shareholders became shareholders in the *Bank of Hindustan* upon the terms prescribed by the agreement. Forty-three of the shareholders—amongst others the Plaintiffs, Messrs. *Higgs* and *Martin*, holders of 50 and 200 shares respectively in the *Imperial Bank*, who were absent from *England* from July until the 24th of September, 1864—repudiated the agreement and refused to become shareholders in the *Bank of Hindustan* upon the terms prescribed by it. Notwithstanding this, the names of the Plaintiffs were entered on the register. In June, 1865, the Plaintiff *Higgs* obtained an order for striking out his name from the register of shareholders in the *Bank of Hindustan*, and immediately afterwards the Plaintiff *Martin* obtained a similar order (1). Shortly afterwards the names of the other dissentients were removed without litigation. The Plaintiffs shortly afterwards presented a Petition to the Master of the Rolls impeaching the amalgamation as *ultrà vires*, and praying that the usual order might be made for dissolving and winding up the affairs of the *Imperial Bank*; or that, in the event of the voluntary winding-up being allowed to continue, it might be subject to the supervision of the Court; or else that, notwithstanding the pendency of the voluntary winding-up, the Petitioners, or either of them, might be at liberty to institute such proceedings at law or in equity in reference thereto as they might be advised, and for this purpose to use the name of the company or of the said liquidators.

The Master of the Rolls dismissed the Petition with costs, but, upon appeal, the Lords Justices, on the 24th of March, 1866, discharged the order of the Master of the Rolls, and in lieu thereof made an order dismissing the Petition so far as it sought to have the company wound up under supervision of the Court, directing that the

(1) See *Higg's Case*, and *Martin's Case*, 2 H. & M. 657, 669.

rest of the Petition should stand over, with liberty to the Petitioners to take such proceedings as they might be advised for impeaching the amalgamation, and, if they should be so advised, to use the name of the company or of the liquidators in such proceedings (1).

Pursuant to the leave reserved by the Lords Justices, Messrs. *Higgs* and *Martin*, on the 5th of May, 1866, filed the present bill, in the first instance in the name of the company, but by amendment, in the name of the company and of themselves as Plaintiffs, praying that the pretended amalgamation and transfer might be set aside as invalid and *ultrà vires*. The Defendant company was being wound up voluntarily under the supervision of the Court, by an order of Vice-Chancellor *Stuart* of the 21st of December, 1866, and leave had subsequently been obtained by the Plaintiffs for prosecuting the suit against the Defendant company.

The bill alleged that the agreement was not, in fact, a fair and equitable agreement, so far as the members of the Plaintiff company were concerned, and that its object and effect were, secretly, but with the knowledge and consent of the Defendant company, to confer pecuniary benefits upon certain individuals (*e.g.* payments to the non-transferred directors of the Plaintiff company, remuneration for pretended services), at the expense of the general body of the members of the Plaintiff company, and also to dispose of a large number of shares of Defendant company at a price much beyond their true value. The bill also alleged that the alleged amalgamation and transfer were authorized neither by the articles of association of Plaintiff company, nor (from want of sufficient notice) by the provisions of sect. 161 of the *Companies Act*, 1862; and that, even if the special resolution passed by Plaintiff company at the meeting of the 25th of August, 1866, was not invalid from the want of sufficient notice, the transaction was invalid, not being in pursuance of the powers conferred by, or in accordance with the requirements of, sect. 161.

Mr. *Druce*, Q.C., Mr. *Kay*, Q.C., and Mr. *J. N. Higgins*, for the Plaintiffs:—

The amalgamation is altogether invalid, either as an amalgamation under article 62 of the articles of association of the Plaintiff

(1) *In re Imperial Bank of China*, Law Rep. 1 Ch. 339.

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company, or as a transfer of assets under sect. 161 of the *Companies Act*, 1862.

First: It is not an amalgamation under article 62, as in the Plaintiff company the shares were £50 each, and in the Defendant company £100 each, so that the liability of members of the *Imperial* is at once doubled, and not only is the liability doubled, but members of the *Imperial* can only obtain shares in the *Bank of Hindustan*, under the agreement, upon the terms of paying a premium of £6 per share. Whatever may be the precise legal meaning of the word "amalgamation," it certainly does not mean any such arrangement as this, which was in no sense a fusion of the interests of the two companies, but "simply a sale of its business by one company to the other": *Higg's Case* (1); *Ex parte Bagshaw* (2); *Clinch* v. *Financial Corporation* (3).

Secondly: If not good as an amalgamation, it cannot be supported as a transfer of assets by the liquidators under sect. 161 of the *Companies Act*, 1862. That section requires "the sanction of a special resolution of the company by whom they were appointed" for the transfer or sale by the liquidators; while sect. 51 of the same Act defines the requisites of a "special resolution," viz., that it must be passed by a certain majority at a "general meeting of which notice, specifying the intention to propose such resolution, has been duly given." In this case, the notice convening the meeting of the 25th of August in no way, either directly or indirectly, referred to sect. 161, or to any intention on the part of the directors or company to treat the arrangement as a transfer of assets under that section. It was plainly treated in that notice as an amalgamation under the articles, and, looking at the penal consequences to shareholders who are by that section bound by the sale, unless they signify their dissent within seven days, they are entitled to full and distinct information of the course proposed to be taken, and the Court will not treat that which was originally intended as an amalgamation as capable of being supported by inference as a transfer of assets within sect. 161: *In re Bridport Old Brewery Company* (4); *Lawes' Case* (5).

(1) 2 H. & M. 657.
(2) Law Rep. 4 Eq. 341.
(3) Law Rep. 5 Eq. 450.
(4) Ibid. 2 Ch. 191.
(5) 1 D. M. & G. 421.

Independently of other objections, the secret arrangement by which the directors of the *Imperial Bank* were to receive compensation out of the funds of the *Bank of Hindustan* is a sufficient ground for setting aside the arrangement: *Clinch* v. *Financial Corporation* (1).

There has been no acquiescence on the part of the Plaintiffs, who repudiated the arrangement as soon as they returned to this country, such as to bar their right to relief, or delay in the proceedings, it having been expressly stated by Lord Justice *Turner*, in his judgment of the 24th of March, 1866, that the facts of the case accounted for the delay in the application to the Court, while the present bill was filed on the 5th of May, 1866, within the earliest possible period after the judgment of the Lords Justices.

Sir *Roundell Palmer*, Q.C., Mr. *W. M. James*, Q.C., and Mr. *Eddis*, for the Defendants, the *Bank of Hindustan*:—

The Defendant company was prosperous at the time when this arrangement, which was perfectly *bonâ fide*, was entered into, and although forty-three holders, of 1090 shares, in the Plaintiff company have since been found to object to it not a dissentient voice was raised against the arrangement when it was submitted to the shareholders for their confirmation at the meeting of the 12th of September, 1866. We do not rest the transaction upon the 62nd clause of the Plaintiff company's articles of association, but upon sect. 161 of the *Companies Act*, 1862, which was expressly intended to provide for this sort of arrangement—a handing over of the assets in consideration of shares—which fulfils those conditions which were wanting in *Clinch* v. *Financial Corporation*. Vice-Chancellor *Wood* there says (2), that the object of the 161st section is to enable a sale of the assets of a company to another company, so as to be binding on shareholders, though it would be optional with each one whether to take the shares or not.

Every portion of this arrrangement is within the terms of, and authorized by, sect. 161, and we also submit that the requirements of that section as to notice have been fully complied with. No doubt the notice to the shareholders of the special resolutions to

(1) Law Rep. 5 Eq. 450. (2) Law Rep. 5 Eq. 472.

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be proposed at the meeting required by sect. 161, must be real and not illusory, but it is sufficient if the notice states fairly and in substance what is going to be done. In *Clinch's Case* a false and delusive circular was issued, but here it is impossible to say that the shareholders of the Plaintiff company were not fully informed by the notices of what was proposed to be done. With respect to the receipt of compensation money by the retiring directors and the manager of the Plaintiff company, the answer states distinctly that any such payments were made without the knowledge or sanction of the Defendant company.

But even assuming the transaction to have been as invalid as the bill asserts it to be, the delay on the part of the company (which is not cured by the steps to repudiate the transaction taken by Messrs. *Martin* and *Higgs*) is a bar to any relief, as it is now impossible to replace the parties in their original situation, or to effect that *restitutio in integrum* which was possible in *Clinch's Case*. The transaction has been acted upon, the position of the Defendant bank has been allowed to be altered, and new liabilities have been incurred on the faith of this arrangement, which cannot now be disturbed: *Re Saxon Life Assurance Society* (1); *Hallows* v. *Fernie* (2).

SIR G. M. GIFFARD, V.C.:—

It was admitted, and very properly admitted, on the part of the Defendants that this transaction could not be supported under the clause in the articles of association. In point of fact it was not an amalgamation, and that has been really decided by Lord Justice *Wood*, when he said that he could not define what an amalgamation would be. That brings us to sect. 161 of the *Companies Act*, 1862, and upon that section I am of opinion, first, that there was no proper notice given of the special meeting necessary for passing the resolution; and, secondly, that this is not a transaction within sect. 161. With regard to the notices, it is important to bear in mind that the articles themselves contain power to amalgamate. The first thing in the shape of notice is the circular of the 28th of July. From that letter any person receiving it would naturally infer that what

(1) 2 J. & H. 408. (2) Law Rep. 3 Eq. 520

was intended was an amalgamation under the articles. Then comes the circular of the 10th of August, 1864, which states as follows:—"With reference to the circular addressed to the shareholders on the 28th of July last, I have now to inform you that an extraordinary general meeting of the shareholders of this company will be held at the *London Tavern*, on the 25th inst. at 12 o'clock precisely, when the agreement entered into with the *Bank of Hindustan, Limited*, will be submitted for approval, and resolutions to voluntarily wind up the bank and appoint liquidators will be proposed." Now, the first thing one observes upon that is, that there is not a syllable there about giving the liquidators power to carry out the arrangement. Taking that in connection with there being a power to amalgamate, and in connection with the antecedent circular—I do not wish to be technical about these things at all but—I do not think it states fairly and unmistakably that this was to be a proceeding under sect. 161, and I think any person reading that notice would fairly infer that it was not to be under sect. 161, and, at all events, if it was intended to be under that section that there would be some subsequent meeting at which there would be a special resolution to authorize the liquidators to do what was necessary. Then the notice goes on: "The following are in substance the terms of amalgamation," and it states "20,000 new shares, of £100 each, of the *Bank of Hindustan* to be issued to the holders of the 20,000 shares in this bank, such shares to be issued at £6 per share premium."

Now, I say that would necessarily lead one to suppose that it would not be under sect. 161, because the object of that section is to have shares put in the hands of liquidators to distribute; and how could any one infer from an arrangement under which people are to pay individually £6 per share premium, that it was intended to proceed under sect. 161? Considering who the parties really were at this time, I doubt whether they thought much about sect. 161 at all; but when they did think about it, observe what they put into their resolution. It is plain and unmistakable, and it would have been as easy to put in their original notice what they put in this resolution. In this second notice (summoning the meeting of the 12th of September) they say that the resolution was passed that the company be wound up voluntarily, and that certain persons

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were appointed liquidators, "and that the liquidators be authorized to receive in compensation or part compensation for the business and property of this company shares in the *Bank of Hindustan*." That is plain enough. If anything like it had been put into the first notice it would have been sufficient. I believe it would have been sufficient if the first notice had gone on and said, "This is to be carried out under the Act;" or, even short of that, if it had given notice to the parties that it was intended to pass a resolution giving authority to the liquidators to carry out the arrangement. Let us now see what the terms of sect. 161 are:—[His Honour read the words of that section.] Can it be that an agreement which imposes upon each individual shareholder the necessity and liability of paying the £6 premium per share, is an arrangement within that clause? If the arrangement was bad in *Clinch's Case*, I should say, *à fortiori*, it is bad here, and I do not hesitate to say that an arrangement under that clause cannot be valid if it contains a condition precedent on the individual shareholder to pay something, not towards the capital of the new company in respect of which he is to receive profit, but by way of premium for shares. That plainly and manifestly invalidates the whole transaction.

16 Eq 425

Then comes the question of acquiescence. The bill is filed on behalf of two shareholders and the company and I do not think there has been acquiescence. Without going through the case, it is manifest that there were always dissentient shareholders who were giving notice to the company of their dissent. Two of the shareholders got their names removed, and immediately after that the Defendant company removed the other forty-one dissentients. That being so, they were in the position of dissentient shareholders of the Plaintiff company. It is excessively difficult to make out acquiescence on the part of a body such as a company is. I can understand acquiescence in a case where it is in the power of the persons said to have acquiesced to confirm, but when it is not in the power of the persons said to have acquiesced to confirm, it requires, in order to establish acquiescence, a case from which it must necessarily be inferred that every member of the company has assented. The direct reverse of that is proved in this case. That being so, the justice between the parties is that

7 C 653

this transaction should be undone, subject to this, that inasmuch as a great number of shareholders have chosen, which they have a perfect right to do, to become shareholders in the Defendant company, the Defendant company, to the extent of the right of these shareholders in respect of the assets, should stand in the place of those shareholders. The result is, that there will be coming to the forty-three dissentient shareholders whatever they ought to have in respect of the assets of the *Imperial Bank*, and with respect to all the other shareholders the *Bank of Hindustan* will get the benefit of their having become shareholders.

MINUTES.—Set aside the amalgamation. Inquiry what shareholders in Plaintiff company had accepted shares in Defendant company, and declare Defendant company entitled to stand in the place of such shareholders in the distribution of the assets of Plaintiff company in the winding-up.

Solicitors: Messrs. *Lewis, Munns, Nunn, & Longden;* Messrs. *Ashurst, Morris, & Co.*

MARSON *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

Lands Clauses Act, s. 92—*Part of a House—Curtilage.*

A public house was bounded on one side by a street, and in front by a vacant piece of ground, not fenced off from the street, and separated from the house only by a narrow foot pavement, also without fence, which was ordinarily used by the public as a thoroughfare, though sometimes closed. The piece of land had been treated as passing to the lessee by every demise of the public house since 1802; it was used by customers of the public house, and it furnished the only means of approach for vehicles to the front-door of the house:—

Held, that the piece of land came within the definition of a curtilage, and was part of the house, within the meaning of the 92nd section of the *Lands Clauses Act*.

7 Eq 548
7 Eq 435,
16 Eq 460-1
19 Eq 884-9

I can find cases 7 Eq 546

THE Plaintiff, Mr. *Thomas Frederick Marson*, in 1861, was admitted as tenant, according to the custom of the manor of *Old Paris Garden*, in the parish of *Christ Church, Surrey*, of a public house, called the *King's Arms*, situate in *Surrey Row*, in the *Blackfriars Road*, and "all (if any) other the customary or copyhold

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land, hereditaments, or premises to which *Thomas Liversedge Fish* (deceased) was admitted at a General Court Baron (6th of October, 1819), and of which the said *J. L. Fish* died seised, with their appurtenances."

J. L. Fish was admitted to the premises by the description of "all and singular the premises included in a surrender and admittance of the 9th of April, 1806, with their appurtenances."

The admittance of the 9th of April, 1806, was an admittance of *Thomas Fish* to the premises by the description of "all and singular the said premises," referring to the description in the surrender, which was as follows: "all that brick messuage, tenement, or public house, with the yard, garden, and appurtenances thereto belonging, situate and being, &c., known by the sign of the *King's Arms*, then on lease to Messrs. *Robert and Charles Calvert*, brewers."

The lease to Messrs. *Calvert*, which was dated the 4th of February, 1802, had endorsed on it a plan of the premises thereby demised, which plan distinctly shewed the piece of ground in question as part of the demise.

By a lease, dated the 28th of December, 1864, the *King's Arms* public house was demised by the Plaintiff, and after the description of the public house came these words:—"And including the piece or parcel of ground in front of the said public house, together with all the rights, easements, and appurtenances to the said premises belonging, or in anywise appertaining, and which said premises are more particularly shewn in a plan thereof drawn in the margin of the said indenture." The piece of ground was shewn on the plan, which represented the ground plan of the house, a back yard, and this piece of ground, as enclosed by four straight lines.

The Plaintiff alleged that ever since 1802 the premises had been demised by *Fish* and his predecessors by a description similar to the above, in leases which had similar plans, with like abuttals drawn in their margin, and no counter evidence was given.

Surrey Row is a street running east and west. On the south side of it stands the public house in question, with a front looking towards the east over a vacant space of ground, being the piece included in the lease. This space of ground is bounded on the north by *Surrey Row*, there being no fence between of any kind; on the east by land which, at the date of the below-mentioned notice, was

in the possession of the *London, Chatham, and Dover Railway Company* from which it was railed off; on the south by walls at the backs of gardens of houses in a street called *Wellington Street;* and on the west (also without fence) by a narrow foot pavement, on the other side of which stood the public house. This pavement communicates with a passage, and the two are used by the public as a thoroughfare between *Surrey Street* and *Wellington Street;* but there is a gate at the end of the passage, which is closed regularly once a year.

On the 18th of July, 1865, the company gave the Plaintiff notice to treat for a small portion at the eastern extremity of the vacant space of ground, On the 20th the Plaintiff sent a counter-notice, requiring the company to take all the property comprised in the lease, including the public house.

The company deposited £10 in the *Bank of England* as the value of the property comprised in their notice to treat, and delivered to the Plaintiff's solicitors the usual bond for that amount. On the 1st of September, 1865, the company took possession of the land.

This bill was filed on the 19th of September, 1865, alleging that the space of ground formed a part of the curtilage of the house, and praying for declarations that the company were bound to purchase the whole of the premises to which the Plaintiff had been admitted, and which were comprised in the lease.

The Plaintiff's evidence went to shew that the ground was from time to time used by customers of the public house, who were accustomed to sit there on benches at tables supplied from the house, and refresh themselves. It furnished also the only means of access for vehicles to the front door of the house.

Mr. *Druce,* Q.C., and Mr. *Bardswell,* for the Plaintiff:—

The only question is, whether this piece of land is part of the house within the meaning of the 92nd section. The authorities on the subject are discussed in *Steele* v. *Midland Railway Company* (1), and the rule seems to be, that whatever is necessary for the convenient use and occupation of the house will pass, but not what is necessary only for the personal use and convenience of the

(1) Law Rep. 1 Ch. 275.

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owner and occupier. We submit that a piece of land which has long been used not only for the convenience of trade customers, but for the actual use of residents and visitors, by supplying means of access for carriages to the front door, must come under this definition.

The real test of the contention is, has this land become part of the curtilage of the house? We say it has: *Jacob's* Law Dictionary, "Curtilage."

The ground has always been occupied with the house.

Mr. *Horsey*, for settlement trustees, in whom the lessee's interest had become vested.

Mr. *Amphlett*, Q.C., and Mr. *Kekewich*, for the company:—

The word "house" is all that there is in the 92nd section; and the question is, what does it comprise? We admit it includes everything necessary for the convenient use and occupation of the house. It would include a right of way; but even then it would not include a right to the soil over which the way passes. No case has gone so far as to decide that under the word "curtilage" is to be included a piece of land, situated as this is, separated from the house by a foot pavement. *Steele* v. *Midland Railway Company* (1) is an authority in our favour; so is *Pulling* v. *London, Chatham, and Dover Railway Company* (2).

In *Fergusson* v. *London and Brighton Railway Company* (3) the connection between the house and ground was much stronger than this. There both had formed one plot until a private road had been planned to separate the pleasure-ground from the newly-built house; and in that case Lord Justice *Turner* differed.

In *Chambers* v. *London, Chatham, and Dover Railway Company* (4), Vice-Chancellor *Wood*, though pressed with the case of *Lord Grosvenor* v. *Hampstead Junction Railway Company* (5), thought that a meadow in lease at the time, which the owner had agreed to let, when occupation was given up, along with a house, in order to form a garden, was not within the section.

(1) Law Rep. 1 Ch. 275. (3) 11 W. R. 1088.
(2) 33 Beav. 644; on app. 12 W. R. 969. (4) Ibid. 479
(5) 1 De G. & J. 446.

SIR G. M. GIFFARD, V.C.:—

I confess I should not have expected to find this case to be one coming within the 92nd section; but after considering the cases that have been decided upon the section, I must hold that this does fall within it.

The decision in *Lord Grosvenor* v. *Hampstead Junction Railway Company* (1), which was very much stronger than the present, shews that this piece of ground comes under the legal definition of "curtilage," and is consequently within the 92nd section of the *Lands Clauses Consolidation Act*, 1845.

The land is, no doubt, convenient for the occupation of the house; the fact of principal importance being, that in order to drive to the front door it is necessary to pass over it. I must consequently hold it to be part of the curtilage to the house.

The Plaintiff's contention, therefore, is right. There must be a declaration that the company is bound to purchase the whole in conformity with the 92nd section of the Act; and an inquiry as to title; reserving further consideration, and costs.

Solicitors for the Plaintiff: Messrs. *Marson, Dadley, & Cronin.*

Solicitors for the Defendants: Messrs. *Underhill & Field;* Messrs. *Freshfields.*

(1) 1 De G. & J. 446.

M. R. 1868 May 6, 7, 8, 27.

ATTORNEY-GENERAL *v.* ELY, HADDENHAM, AND SUTTON RAILWAY COMPANY.

Railway Company—Obstruction of Road—Injunction—Balance of Convenience.

Where a railway company have diverted a road *ultrà vires*, but with a *bonâ fide* view to the convenience of the public, a Court of Equity will not compel them to replace the road so as to make their work *intrà vires*, if the result will be to cause greater inconvenience to the public, or the complaining section of the public.

In such a case an information was dismissed without costs, and without prejudice to the Attorney-General proceeding against the company at law.

aff'd L.J. 2 C. & H. 194

THE *Ely, Haddenham, and Sutton Railway Company*, by their special Act, with which the *Railways Clauses Consolidation Act*, 1845, was incorporated, were empowered to carry their railway across and upon the level of a turnpike road from *Ely* to *Cambridge*. This road (coloured red on the plan) for a short distance coincided with a public road (coloured brown) from *Thetford* to *Grunty Fen*. The railway, as laid down on the Parliamentary plans, crossed the turnpike road at the points *A.*, *B.*, and *C.*, but, according to the plans, it was proposed to divert the turnpike road by carrying it on the north side of the railway upon the line coloured green, and abandoning the part on the south side between *A.* and *B.*, so as to have only one crossing, viz., at *C.* It was, however, subsequently arranged between the company and the trustees of the turnpike road that the crossing should be made at *A.*, and that the road should be diverted on the south side of the railway and carried on the line coloured blue. The railway was made accordingly with a level crossing at *A.*, and a level crossing was also made at *B.* for the use of persons using the public road from *Thetford* to *Grunty Fen*. The inspecting officer of the Board of Trade refused to sanction two level crossings, and thereupon the company stopped up the crossing at *B.*, and made a connecting road along the line coloured green from the public road to the level crossing at *A.*, thereby compelling persons going from *Thetford* to *Grunty Fen*, and *vice versâ*, to make a detour of about 130 yards with two angles.

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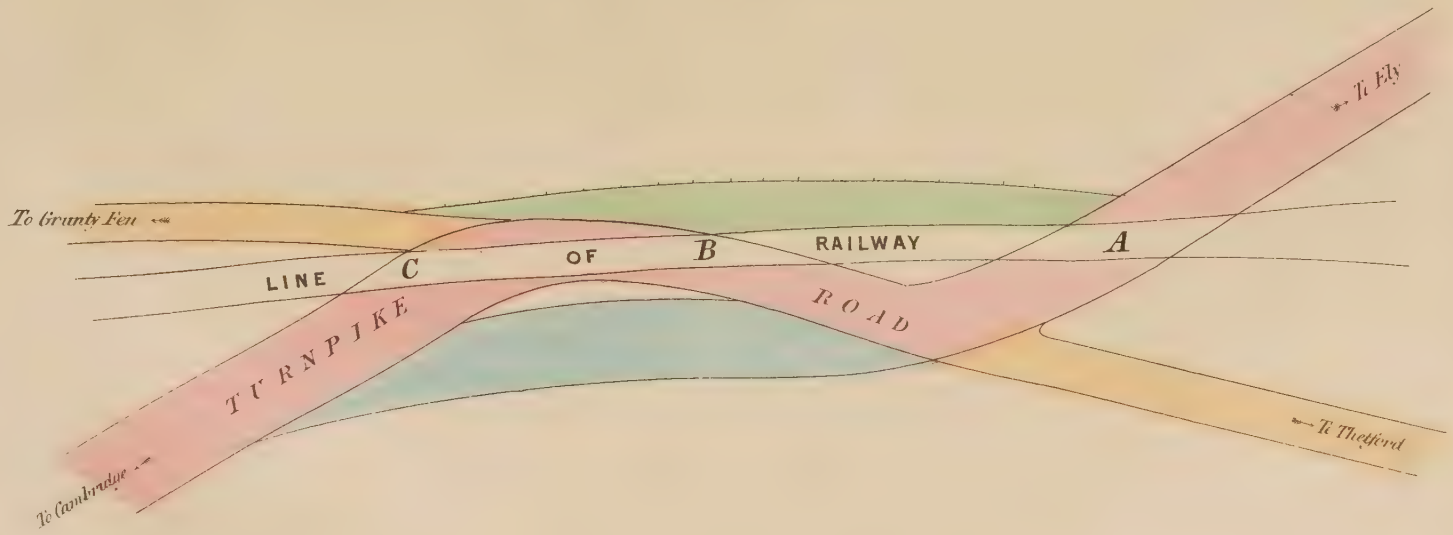

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This was an information at the relation of ten inhabitants of *Thetford*, owning or occupying land at *Grunty Fen*, praying for an injunction to restrain the company from obstructing the public road from *Thetford* to *Grunty Fen*, and permitting it to remain obstructed, and from rendering it unfit or less convenient than it had theretofore been for the passage of foot passengers, horses, cattle, carts, and carriages, or at any rate so to restrain them until they should have made another sufficient road equally convenient, and, if necessary, that they might be ordered to construct all bridges and other works necessary to prevent the road from remaining obstructed, or unfit, or less convenient than it had theretofore been.

The company, by their answer, alleged that the roads from *Thetford* and *Grunty Fen* to the turnpike road, were two distinct roads, and that the intervening portion of the turnpike road was not part of the public road, but there was some evidence to shew that the public road from *Thetford* to *Grunty Fen* had existed before the turnpike road was made. There was some conflict of evidence as to whether the line of railway at the level crossing at *B.* extended beyond the boundary of the turnpike road into the public road; it appeared that the metalling of the public road had been carried within the limits of the turnpike road. The company's engineer and other witnesses stated that the present arrangement for crossing the turnpike road was the most convenient for the public in general, and the trustees of the turnpike road had passed a resolution deprecating any alteration. On the other hand, a meeting of owners and occupiers of land in *Thetford* and *Grunty Fen* had passed a resolution in favour of the removal of the obstruction of the public road.

The whole of the *locus in quo* was on a dead level.

Mr. *Jessel*, Q.C., and Mr. *G. N. Colt*, for the informant:—

The Defendants are doing an illegal act in obstructing the public road, which this Court will interfere to prevent. They cannot by any arrangement with the trustees of the turnpike road so divert that portion of the turnpike road which is common to it and the public road as to obstruct the latter. This would be so even if the public road had been made after the turnpike road, but in

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this case the turnpike road was made after, and took in a portion of the old parish road. If the Defendants will make the level crossing at or near *B.*, and divert the turnpike road, as they proposed by their Parliamentary plans, on the north side of the railway, the same level crossing will be available for both roads.

Mr. *Baggallay*, Q.C., and Mr. *Dryden*, for the Defendants:—

The Defendants were precluded by the *Railways Clauses Act*, 1845, s. 46, from crossing the turnpike road more than once on the level; and in order to avoid the great inconvenience to the public of carrying the road in a flat country either over or under the railway, they were obliged to divert it so as to have only one crossing, and that at the most convenient place. It is clear upon the evidence that for persons travelling between *Cambridge* and *Ely*, and still more for persons travelling from *Thetford* to *Ely* or *Cambridge*, the present arrangement is much more convenient than that which was proposed by the Parliamentary plans, or that which is suggested by the informant, of a level crossing at *B.*, with a diversion of the turnpike road on the north side of the railway. By the 16th section of the *Railways Clauses Act* the Defendants are empowered to divert and alter the course of any road in order the more conveniently to carry the same under or over or by the side of the railway, and in that section the words "more conveniently" must be construed to mean more conveniently for the interests both of the railway company and of the public: *Reg.* v. *Sharpe* (1). The 53rd section provides for the substitution of a new road where it is found necessary to cross a road in such a manner as to render it impassable, dangerous, or extraordinarily inconvenient. In the cases where the Court has interfered to prevent a company from obstructing a road, such as *Attorney-General* v. *Great Northern Railway Company* (2), the company had not made a sufficient substituted road. But, in fact, the Defendants have not obstructed any road except the turnpike road, which they had power to divert with the consent of the trustees. The fact that two public roads run into the turnpike road on opposite sides of it does not entitle the persons using those roads to object

(1) 3 Railw. Cas. 33, n. (2) 4 De G. & Sm. 75.

to a diversion or alteration of the intervening portion of the turnpike road, and the fact that the turnpike trustees have allowed the parish to metal a small portion of their road does not convert that portion into a parish road. The relators therefore have no *locus standi*. The Defendants, in their desire to consult the convenience of all parties, exceeded their powers by making two level crossings; and being prevented by the Board of Trade from continuing that arrangement, they have done what is most convenient to the greatest number of the public who use these roads. All that they can be compelled to do is either to make a bridge over the railway, or to carry out their Parliamentary plans to the letter, as in *Attorney-General* v. *Tewkesbury Railway Company* (1), and either of these courses would produce greater inconvenience to everybody, including the relators themselves, than the present arrangement.

The MASTER OF THE ROLLS:—Assuming that the Defendants have unlawfully obstructed the road, I am disposed to think that the injury to the public and to the relators is too small to justify the interference of this Court.

Mr. *Jessel*, in reply:—

If the Defendants are doing an illegal act, the Attorney-General, as *parens patriæ*, is entitled to call upon the Court to put a stop to it, and he has a right for that purpose to sue in any Court: *Attorney-General* v. *Oxford and Wolverhampton Railway Company* (2). The powers of the 16th section of the *Railways Clauses Act* are only to be exercised subject to the provisions and restrictions in that Act and the special Act, and by the 46th and 56th sections the company are bound either to carry the road over or under the railway; or if it is absolutely necessary to divert it, then to make a substituted road equally convenient. In this case they might, by making a level crossing at *B.*, have carried the railway across both roads with the greatest possible convenience to all parties. The power to divert the turnpike road longitudinally does not entitle the Defendants to obstruct the passage of another road across it transversely. There is sufficient injury to the relators

(1) 9 Jur. (N. S.) 618, 951. (2) 2 W. R. 330.

18 L. J. N. S. 423.

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to support an indictment: *Reg.* v. *Scott* (1): and to entitle them to an injunction: *Attorney-General* v. *London and South Western Railway Company* (2).

May 27. LORD ROMILLY, M.R.:—

This is an information filed at the relation of several persons residing in *Thetford*, and having property in *Grunty Fen*, complaining that the railway company has illegally diverted the road leading directly from *Thetford* to *Grunty Fen*, instead of taking it, as it was originally intended, across the railway by a level crossing, or by what alone in default of a level crossing they legally can do, either by a bridge or a tunnel. Originally the railway company intended to make two level crossings; this was objected to by the inspector of the Board of Trade, and the result was that the direct level crossing to *Grunty Fen* was discontinued, and a line of road on the north side of the railway substituted, with a sharp angle at the spot where it joins the road which leads to *Ely* both from *Cambridge* and also from *Thetford*. This was not done willingly by the railway company, but under compulsion from the Board of Trade. On examining the evidence and the maps my own impression would have been, that the railway company might have contrived more facilities than they have done to the occupiers of land in *Grunty Fen*, without in any degree lessening the public accommodation for persons going by the public highway from *Cambridge* and from *Thetford* to *Ely*, and *vice versâ;* but of this I am not confident; probably no one—not being an engineer, and acquainted with the spot—could come to a satisfactory conclusion on this point. But of this I am quite confident, that to go round by the present road to the level crossing, and then turn sharp to the left and reach the old *Grunty Fen* road at the spot where it formerly joined the *Cambridge* and *Ely* road, would be less troublesome, and require less draught, than to cross over the railway in a straight line by a bridge thrown over it, and still less so than to go under the railway by a tunnel, which would make a hole that would, in a country of this description,

(1) 3 Q. B. 543; 3 Rail. Ca. 187. (2) 3 De G. & Sm. 439.

probably always contain water of a greater or less depth in the bottom.

It is not, in my opinion, the province of a Court of Equity to interfere to compel Defendants who have done something *ultrà vires*, but *bonâ fide* with the view of accommodating the public, to do something other than they have done which would be *intrà vires*, and therefore legal, but would be more inconvenient to the public or the persons complaining than that which exists. It is said and, as I have already said, I think it probable, that another plan for a level crossing might be better, but I have no power to compel this directly, for if what is now done is *ultrà vires* so would the substituted level crossing, which would still be a diversion of the road, and it is not the province of a Court of Equity, under the threat of compelling Defendants to do a very expensive work which would be regular and according to their powers, to drive them into a compromise to meet the views of the persons who have set the Attorney-General in motion. The result is, that I decline to interfere by injunction either ordinary or mandatory, but as I think that the Attorney-General ought not to be prevented from proceeding to abate any obstruction or nuisance which he may consider to exist on the highway or on the parish road in question, I shall dismiss the information without costs, and without prejudice to the Attorney-General taking such steps at law, by way of indictment or otherwise, as he may think proper.

Solicitors for the Informant: Messrs. *Kingsford & Dorman.*
Solicitor for the Defendants: Mr. *J. Wheeler*

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Feb. 12, 13, 14, 17, 18; *April* 18.

TURQUAND *v.* MARSHALL.

Companies Act, 1862, *ss.* 95, 203 — *Unregistered Company—Suit by Official Liquidator on behalf of Company—Practice—Pleading—Liability of Directors for Misconduct—When enforced in a Suit by Liquidator, and when by Shareholders separately—Liability of Directors as Trustees—"Actio personalis moritur cum persona" not applicable to Breaches of Trust by Director—Release of Claims against Shareholder not applicable to his Liability for Misconduct as Director.*

The official liquidator of an unregistered company which is being wound-up under the *Companies Act*, 1862, has power in his own name, and on behalf of the company, to institute a suit in equity against directors of the company, for the purpose of compelling them to make good losses occasioned by their misconduct in the management of its affairs.

The issue of false balance sheets, and the payment of dividends out of capital, are not proper grounds for the institution of such a suit, because the injury occasioned thereby is not common to all the shareholders, but may affect each individual in a different manner:

Semble, therefore, that for injury so caused each shareholder must take proceedings independently of the others.

Where loss was occasioned (1) by continuing the business of the company without calling a meeting to consider the propriety of dissolving it; (2) by advances to directors; both of such acts being contrary to express provisions of the deed of settlement:—

Held, that the directors who so neglected the provisions of the deed of settlement were liable, in a suit instituted by the official liquidator, to make good the loss.

Directors who neglect the rules of a company are liable to make good to the shareholders any loss occasioned thereby; and their liability in this respect does not differ from that of ordinary trustees.

Where, therefore, directors might have learned from the books of the company the true state of its affairs:—

Held, that, although in fact they were ignorant of the state of affairs, their ignorance was no defence in a suit instituted for the purpose of compelling them to make good losses occasioned by their neglecting to take the steps which, by the provisions of the deed of settlement, they ought to have taken under the circumstances.

A release, discharging a shareholder of a company from all claims and demands which the company or the official liquidator might have against him as a shareholder or contributory of the company:—

Held, not to release him from liability for misconduct as a director.

THIS was a suit by *William Turquand*, official liquidator of the *Herefordshire Banking Company*, suing on behalf of the company;

and it sought to render certain directors of the company liable for various acts and defaults in the management of the company's affairs.

The company was established in 1836, under the Act 7 Geo. 4, c. 46, with a nominal capital of £300,000, divided into 12,000 shares, of £25 each. The material provisions of the deed of settlement are set out below (1).

(1) Clause 28 provided that whenever the directors declined to accept any proposed transferee of shares as a shareholder, it should not be incumbent upon them to assign any reason for their so declining, nor should their so declining be construed to imply any objection to the person who should be so proposed, but should be understood to signify an intention on the part of the directors to become the purchasers (on behalf of the company) of the shares so proposed to be transferred.

By clause 48 the decision of the major part in number of every meeting of directors was to be deemed the decision of the board of directors.

By clause 52 the business of the company was to be exclusively confined to that of banking in all its branches, including, amongst other things, purchases and investments, dealings or sales, in or upon the government or other funds of *Great Britain*, navy or Exchequer bills, *India* bonds, Bank or *East India* stock, shares of the stock of the company, or of the stock of the Bank of *England*, or the banks of *Ireland*, or the chartered banks of *Scotland*, or other joint stock banks as to the board of directors for the time being should seem expedient.

Clause 53. "It shall be lawful for the board of general directors, and also for any local board of directors, with the consent of such general board, to give credit, with or without security, upon cash accounts, or make advances either to the proprietors of the said company, or to any other person or persons, whether partners or not, to such extent or amount as such general directors may think proper, and agreeably to the bye-laws made or to be made from time to time by the board of general directors for the regulation of advances, but no proprietor or shareholder in the said company shall be entitled to demand cash or other credit, but the same shall be given or withheld at the discretion of the general directors, and no director of the said company shall be allowed to vote on any proposition or motion for making advances or giving credit to any person, or to vote in judging of bills or promissory notes, or other securities, offered for discount, if such director, or any person standing towards him in the relation of partner, father, mother, brother, sister, child, wife, uncle, aunt, cousin, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, nephew, or niece, be the person, or some one of the persons, to receive or participate in such advance, credit, or discount, and in no case shall a cash advance or credit be made or given to or on account of any director of the said company, either alone or in partnership with any other person or persons, without the consent of the board of general directors for the time being, but no director on whose account or for whose benefit any such cash advance or credit is proposed to be given shall vote on the question."

By clause 75 the directors, trus-

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The company commenced business in 1836. Shares were allotted to the number of 4584: and on these calls amounting in the whole to £12 10s. per share were paid. In 1842 it was discovered that a large portion of the capital had been lost, and a meeting of the shareholders was called in accordance with the 108th clause of the articles to consider whether the company should be wound up. It was resolved that the company should

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tees, and other officers, were not to be answerable or accountable one for the other or others of them, nor for the acts, deeds, or defaults of any others or other of them, but each of them only for his own acts and deeds and defaults respectively, nor for the insufficiency or deficiency of any security upon which the moneys of the company might be placed out or invested, nor for any loss, damage, or misfortune, which might happen to the money, funds, property, or effects of the company, unless the same happened by reason of the wilful neglect or default respectively of any such director, trustee, or other officer or servant of the said company.

By clause 88 the directors were required to cause all necessary and proper books of accounts to be provided and carefully kept, and to cause to be made in those books fair, explicit, and true entries of all receipts, payments, transactions, and dealings which should, from time to time, be made by or on behalf of the company, and of all profits, gains, and losses arising therefrom, and also an account of all dealings and investments which should be made with or out of the capital of the company, or of the money deposited with the company, and in the months of January and July in each year should settle, adjust, and balance the said books up to the last days of December and June previously, and make out a full, true, and explicit statement and balance sheet exhibiting the debts and credits of the said company, and the amount and nature of the capital and property thereof, and the then fair estimated value thereof, and the amount of the company's negotiable securities then in circulation, and the profits and losses of the company, and all other matters and things requisite for fully, truly, and explicitly manifesting the state of affairs of the company; but, nevertheless, no proprietor or shareholder who should not be a director or auditor, or one of the officers of the company specially appointed for that purpose, should be entitled to inspect or to have in equity a discovery of the books, accounts, documents, deeds, or writings of the company, except such as might or should be produced for that purpose at any general or special meeting of proprietors.

By clause 89, at every annual meeting of the proprietors the directors were to exhibit to the proprietors then assembled a true and accurate summary or balance sheet and report of the gains, profits, accumulations, and losses of the company, and of the state and progress of the affairs of the company up to the last day of December next preceding such meeting, and also such further accounts as the directors should deem expedient or for the interest of the company to be made public.

Clause 91: "At the annual general meeting to be held in the month of February in every year succeeding the the year 1838, during the continuance

not be wound up, but that the capital should be reduced by £2 10*s.* per share; and the shares were thenceforth treated as having only £10 paid upon them.

The company continued to carry on business down to June, 1863, when it suspended payment; and it was ordered to be wound up in November following.

The acts complained of by the bill commenced in the year 1846,

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of the said copartnership, the general directors for the time being shall declare such dividend out of the clear profits of the company then actually accrued and reduced into possession (including the interest and proceeds of capital laid out or invested in pursuance of the powers herein contained in that behalf) as they shall think fit."

Clause 92: "The board of general directors (if they shall so think fit) may retain all or any part of the profits of the said company which shall be made up to the 1st of January, 1837, and apply the same towards forming a fund to be called 'The Surplus Fund,' and may in each or any succeeding year during the continuance of the said company retain such portion of the net profits of the said company (after making deduction for bad and doubtful debts), and apply the same towards the said fund called 'The Surplus Fund,' as they the said board of directors shall think fit."

Clause 93: "The said fund called 'The Surplus Fund,' shall be added to and be deemed part of the capital of the said copartnership, and shall on the dissolution of the company belong to and be divided among the persons then entitled to the capital of the said company, in the same shares as they shall be entitled to such capital, but so that the money constituting the said 'Surplus Fund' be carried to a separate account in the books of the company; and the primary object of such surplus fund is hereby declared to be, to meet and provide against unforeseen emergencies, losses, or extraordinary demands upon the company, and the same shall or may be applied by and at the direction of the board of general directors accordingly."

Clause 108: "If at any time the losses of the said company shall have exhausted the whole of the said fund called 'The Surplus Fund,' and also one-fourth part of the capital of the said company which shall have been actually paid up by the proprietors, without regard to the amount of the said subscribed capital, then the board of general directors of the said company for the time being shall, as soon as possible after the above-mentioned state of the company shall have been known to them, call a special general meeting of the proprietors or shareholders of the said company, and shall submit to such meeting a full statement of the affairs and concerns of the said company, and, if required, verify such statement by the production of the books and vouchers of the company, and in case it shall appear at such meeting that the losses of the said company shall have exhausted the said fund, and also one-fourth part of the then paid-up capital thereof as aforesaid, then the chairman at such meeting shall declare the said copartnership dissolved, and the same shall stand and be dissolved accordingly."

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it being alleged that any investigation into the management of the bank prior to that time would be useless, by reason of the insolvency or small means of the directors. The persons who acted as directors subsequently to 1846 were the Defendants, *James Grayston*, and *Thomas Sowdon*, who were elected prior to 1846, and continued to act until the winding-up in 1863; *William Crowther*, who was elected in 1846, and continued to act until 1863; Colonel *Powell*, who was elected in 1844, and continued to act until his death in 1856; *Edward Smeeton*, who was elected in 1855, and continued to act until the winding-up in 1863; *Henry Edwards*, who was elected in 1849, and continued to act until his death in 1851; and *William Higgins*, who was elected in 1849, and ceased to act in 1858. *William Crowther* and *Edward Smeeton* had died since the winding-up order was made, and their legal personal representatives, as well as those of *Powell* and *Edwards*, were Defendants to the suit. *Higgins* died in 1860 insolvent, and his personal representatives were not made Defendants.

The first ground of complaint was that from 1846, down to the termination of the business of the company the directors annually presented to the shareholders false reports of the progress and proceedings of the company, and false balance sheets, and recommended the declaration of dividends upon repeated false statements that profits had been earned. The items in the balance sheets which were complained of were the following:—1. Shares in the company which, to the number of 2958, were from time to time purchased by the directors at prices below their nominal value were included in the general item "current accounts" at the nominal paid-up value of £10 per share. 2. In the item "bills of exchange and cash in hand" were included over-due bills which were either worthless, or worth very much less than the sums for which they were drawn. 3. Debts to the company were treated as good which were either irrecoverable or probably bad. 4. An account was kept in the ledger called the "bad and doubtful debt account," on the debit side of which were entered some of the bad debts of the company, and certain charges, such as solicitors' bills, rents, &c.; while on the credit side were entered sums transferred from the profit and loss account; the difference between the price paid by the company for shares purchased by them and

the nominal value of £10 per share, and dividends on such shares; the effect being to shew a balance on the credit side of the account, which was treated as an asset and included in the balance sheets under the item "current accounts." The result of this mode of dealing with the accounts was that in 1846 the assets were over stated by upwards of £13,000, and in each succeeding year by an increasing sum, until, in 1859, the over estimate exceeded the actual capital of the company. In order to make out these balance sheets trial balance sheets were first of all prepared from the accounts in the mode just stated, and if they shewed a balance sufficient to enable a dividend to be declared, they were presented to the shareholders; but if not, alterations were made in the accounts so as to swell the apparent assets and shew in the balance sheets a sum out of which a dividend could be paid. Copies of these trial balance sheets were found among the company's papers. In consequence of these false statements a dividend of 8*s.* per share was paid in 1847; and a dividend of 10*s.* per share in each succeeding year down to and including 1863.

In addition to the false representations made by the balance sheets, it appeared that the directors had at the annual meetings and at other times, down to 1863, held out the bank to be a flourishing and prosperous institution. In particular, at the annual meeting in 1856, certain of the then directors, in reply to questions put by Mr. *Skey*, a shareholder, expressly stated that all bad debts had been written off, that the surplus fund was actually in hand to meet future bad debts, and that if the bank were then to be wound up the whole of the proprietors' capital was safe. By these statements Mr. *Skey*, who had previously had some intention of selling his shares, was induced not only to abandon such intention, but to purchase other shares in the company.

The next ground of complaint was the failure of the directors to dissolve the company under the 108th clause of the deed of settlement; the whole of the surplus fund and one-fourth of the paid-up capital having, to the knowledge of the directors, been lost in 1846. No part of such loss was ever recovered.

The last ground of complaint was that *Higgins*, one of the directors, was improperly allowed to overdraw his account to the extent of £8134 2*s.* 11*d.*, without the sanction of any resolution of

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the board of directors. The whole of this sum was included at its full amount as a good debt in every balance sheet subsequent to the death of *Higgins* in 1860, although he died insolvent, and no portion of the debt was ever recovered.

The assets realized in the winding-up amounted to £55,285 14*s.* 4*d.*; the debts proved amounted to £92,497 3*s.* 8*d.*, leaving a deficiency of £37,211 9*s.* 4*d.* to be provided by calls on the contributories. Of this sum £30,123 1*s.* had been raised. Mr. *Skey's* contribution alone amounted to £15,665.

The bill prayed: 1. For an inquiry as to the damages caused to the company and shareholders in consequence of the business of the company being continued after the surplus fund and one-fourth of the capital had been lost. 2. For an account of the dividends distributed by the directors since 1846, making allowance for so much (if any) of such dividends as should not appear to have been actually paid out of assets of the company. 3. For an inquiry as to the damages caused to the company and the shareholders by allowing directors and others to overdraw their accounts to an undue extent, and by allowing bad debts to remain so long outstanding as to become irrecoverable; by the publication of false reports and false balance sheets, and all other breaches of trust which might be shewn by the Plaintiff to have been committed by *Crowther*, *Smeeton*, *Powell*, *Edwards*, *Grayston*, and *Sowdon*, or any one or more of them. 4. For a declaration that *Grayston* and *Sowdon* and the estates of *Crowther*, *Powell*, *Edwards*, and *Smeeton* were jointly and severally liable to make good and replace to the assets of the company the damages which should be ascertained in pursuance of the inquiries 1 and 3, and the amount of dividend ascertained under the account 2, or at least such damages as were caused, and dividends distributed, while the said persons respectively were directors of the bank; and for consequential relief.

Sowdon and *Grayston* both denied that they had any knowledge of the true state of the affairs of the bank, and alleged that they had relied on the representations made to them by the general manager. They admitted, however, that in 1852, 1861, and 1862, they had been privy to falsifications of the balance sheets to a slight extent. *Grayston* claimed to be exempt from all further

liability, having entered into an arrangement with the official liquidator whereby, for valuable consideration, the official liquidator had discharged him from all calls, liabilities, claims, and demands whatsoever, which the company or the official liquidator then had or might thereafter have or be entitled to against him in respect of his being or having been the holder of shares or otherwise as a contributory of the company.

Sowdon had been from the year 1850 one of the managing directors of the company; and in the opinion of the Court it was established by the evidence that he was aware that the accounts furnished to the shareholders were grossly inaccurate.

The representative of *Colonel Powell* put in a voluntary answer, and thereby stated that all the assets come to his hands had been exhausted in payment of debts.

Sir *Roundell Palmer*, Q.C., Mr. *Roxburgh*, Q.C., and Mr. *Swanston*, Q.C., for the Plaintiff:—

The object of the suit is to make the directors liable for breaches of trust. The directors have in various ways fraudulently abstracted large sums from the funds of the company; they have also systematically neglected the provisions of the articles of association, and thus great loss has been occasioned to the shareholders.

It is true that in general nonfeasance does not create a liability, but where nonfeasance is for a fraudulent purpose it does: *Charitable Corporation* v. *Sutton* (1).

The liability of directors has been considered in a series of cases in *Scotland* arising out of the failure of the *Western Bank*: *Davidson* v. *Tulloch* (2); *Western Bank of Scotland* v. *Bairds* (3); *Western Bank of Scotland* v. *Bairds' Trustees* (4). The principle there laid down is, that wherever the directors have a duty to perform, and that duty is not performed, the directors are under a liability to relieve the shareholders from all loss so occasioned. Applying that principle to the present case, the directors must relieve the shareholders, who are represented by the official liquidator, from

(1) 2 Atk. 400.
(2) 3 Macq. 783.
(3) 24 Court of Session Rep. (2nd Series), 859.
(4) 4 Court of Session Rep. (3rd Series) 1071.

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all loss occasioned by knowingly carrying on the business contrary to the provisions of the articles of association.

As to the payment of dividends out of capital, it will be said that the shareholders who have received them ought to be parties to the suit. But the dividends were received in the belief that they were paid out of profits; and the shareholders had no means of knowing that such belief was erroneous. A fraudulent trustee cannot refuse to replace capital because dividends have been paid thereout to innocent *cestuis que trust;* and when it comes to be a question of replacing capital, the distinction between the company and the shareholders who compose it is a substantial one: *Society of Practical Knowledge* v. *Abbott* (1). An unauthorized payment to a shareholder is no better than a similar payment to a stranger, and is not a good discharge: *Preston* v. *Liverpool and Manchester Railway Company* (2); *Caledonian Railway Company* v. *Magistrates of Helensburgh* (3); *Downes* v. *Bullock* (4). In no case is there any power in the Court to compel a *cestui que trust* to refund payments made to him unless there is knowledge on his part that such payment is wrongful: all that can be done is to apply any fund which may afterwards come to him in recouping the persons injured: *Bate* v. *Hooper* (5); *Buckeridge* v. *Glasse* (6). Here not only were the shareholders ignorant that any breach of trust had been committed, but positive representations were made to them shewing that the dividend was rightfully declared. It is clear that each shareholder has an individual right to the dividend so paid to him: *Sturge* v. *Eastern Union Railway Company* (7); *Carlisle* v. *South-Eastern Railway Company* (8). The shareholders therefore cannot be made parties by representation; and to make them parties individually would be impossible. Can it be said that the company is thus to be deprived of all remedy for an improper distribution of its funds?

The *Statute of Limitations* has no application to a case like this: as time only begins to run from the discovery of the malfeasance; *Randall* v. *Errington* (9).

(1) 2 Beav. 559.
(2) 5 H. L. C. 605.
(3) 2 Macq. 391.
(4) 25 Beav. 54; 9 H. L. C. 1.
(5) 5 D. M. & G. 338.
(6) Cr. & P. 126.
(7) 7 D. M. & G. 158.
(8) 1 Mac. & G. 689.
(9) 10 Ves. 423.

The rule *actio personalis moritur cum personâ* does not apply to breaches of trust; the representatives of deceased directors are therefore properly made parties: *Davidson* v. *Tulloch* (1); *Price* v. *Morgan* (2); *Rawlins* v. *Wickham* (3); *Walsham* v. *Stainton* (4).

Mr. *Druce*, Q.C., and Mr. *W. W. Cooper*, for the representative of *Crowther*:—

The main charge in the bill is, that the directors did not stop the bank at the proper time; but, in truth, the proper time for stopping the bank was in 1842. The shareholders considered the matter then, and deliberately resolved to go on; and they cannot, after that, take advantage of the 108th clause.

As to the improper items in the balance sheets, they are all authorized by the deed of settlement, and all that is proved is, that the directors came to a wrong conclusion as to the value of the assets.

As to the case of *Higgins*, the deed of settlement contemplates loans to directors, and it was not necessary that a special vote should be taken every time an advance was made. It is not shewn that *Higgins* was, to the knowledge of the directors, a person to whom advances could not be safely made.

As to the position of the directors, they are not trustees, but simply agents required to perform the duties imposed upon them by the deed of settlement, and subject to the liability to which every one is exposed who acts on fixed instructions, but to no other. The only case in which directors have been fixed with liability as trustees are those in which they have made profits by their position, as in *York and North Midland Railway Company* v. *Hudson* (5), or where they have received promotion-money not mentioned by the articles of association: *Pulsford* v. *Richards* (6). A director is not liable in equity for a deviation from the strict line of duty which may lead to loss, but which does not bring profit to him. If he act *ultrà vires*, but *bonâ fide*, there may be a case for an action at law; but unless he makes profit by the transaction a bill will not lie: *Corporation of Ludlow* v. *Greenhouse* (7).

As to the constitution of the suit, there is not a proper Plaintiff.

(1) 3 Macq. 783.
(2) 2 Ch. Ca. 215.
(3) 3 De G. & J. 304.
(4) 1 D. J. & S. 678.
(5) 16 Beav. 485.
(6) 17 Ibid. 87.
(7) 1 Bli. (N. S.) 17.

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This is no technical objection, for unless there is a proper Plaintiff, so that every shareholder may be bound, there ought to be no decree. The Plaintiff ought to have been the *Herefordshire Banking Company* suing by *William Turquand*. Where a bill is filed on behalf of a company to bring back the funds of the company, the company must be parties to the suit. If there is no winding-up, the bill is properly filed by the public officer: *Harrison* v. *Brown* (1); and the only way in which the position of matters is altered after the winding-up is that, by sect. 95 of the *Companies Act*, 1862, legal proceedings are to be taken by the official liquidator in the name of the company. In *Turquand* v. *Kirby* (2) the official liquidator was the proper Plaintiff, because the object there was to enforce a call: here the object is to get in assets belonging to the company before the winding-up, and the suit must be by the company, otherwise the Defendants will be left at the mercy of any shareholder who is not properly represented by Mr. *Turquand*.

This suit is not justified by sect. 165 of the *Companies Act*, 1862. That section creates no liability which did not exist before; it only provides a more speedy remedy. Besides, that section does not apply as against executors of a deceased director: *Feltom's Executors' Case* (3).

As to the repayment of dividends:

[LORD ROMILLY, M.R.:—I cannot make a decree according to the second paragraph of the prayer of the bill. The shareholders cannot in this suit be heard to say that the dividends have been improperly paid; but if the payment has occasioned any loss to the company, the directors may be liable for that.]

That would be a case for damages only, and a bill for damages merely will not lie: *Bovey* v. *Tracey* (4); *Newham* v. *May* (5); *Sainsbury* v. *Jones* (6); *Powell* v. *Aiken* (7); *Clifford* v. *Brooke* (8). Besides, the shareholders have benefited by the breach of trust, and they are liable to recoup as well as the directors; and in their absence no decree can be made: *Raby* v. *Ridehalgh* (9).

(1) 5 De G. & Sm. 728.
(2) Law Rep. 4 Eq. 123.
(3) Ibid. 1 Eq. 219.
(4) 2 Eq. Ca. Ab. 163, pl. 23.
(5) 13 Price, 749.
(6) 2 Beav. 462; 5 My. & Cr. 1.
(7) 4 K. & J. 343.
(8) 13 Ves. 131.
(9) 7 D. M. & G. 104.

In cases of tort, as this is, there is no remedy against the executors of the person who has committed the wrong. *Davidson* v. *Tulloch* (1) was expressly decided on the ground that the law of *Scotland* in this respect differed from the law of *England*. *Price* v. *Morgan* (2) decides no more than this, that the executor of an executor may be sued in the same way the executor himself might have been. *Rawlins* v. *Wickham* (3) was a bill to set aside a contract on the ground of fraud. *Walsham* v. *Stainton* (4) was a suit to recover profits made by an agent; and neither is applicable to the present case.

Mr. *Jessel*, Q.C., and Mr. *Everitt*, for the representatives of *Smeeton*:—

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First: The wrong person is Plaintiff. The bill should have been filed in the name of the company: sect. 95 of the *Companies Act*, 1862, is express on that point. The official liquidator cannot sue in his own name unless he has obtained a vesting order under sect. 203, which, in this case, he has not obtained.

Secondly: The company itself could not have sued. The bill asks for damages for loss caused to the company and all shareholders. If the loss is caused to the shareholders they, and not the company, ought to sue for the damages. They may have suffered loss by the company not being wound up, but how can it be any injury to the company, as distinguished from the shareholders, that its existence was not cut short?

Again: as to the dividends being paid out of capital, that merely amounts to this, that the capital has been restored to the shareholders. But how is that an injury to the company? A bill might be filed to prevent the thing being done; but when done there is no remedy.

Further: a bill for damages cannot be sustained. The decision in *Charitable Corporation* v. *Sutton* (5) has never been followed, and is not law. The Court has no jurisdiction to give damages, except under *Lord Cairns' Act*, which only applies to cases of specific performance and injunction, and there only as incidental to the main relief.

(1) 3 Macq. 783.
(2) 2 Ch. Ca. 215.
(3) 3 De G. & J. 304. 5 Jur N.S. 270
(4) 1 D. J. & S. 678. 6 Jur N.S. 1201
(5) 2 Atk. 400.

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Again: it has been expressly decided that a suit by or on behalf of a company to make certain members of the company make good moneys for the benefit of the others cannot be sustained: *Ernest* v. *Weiss* (1); *Bryson* v. *Warwick and Birmingham Canal Company* (2).

Mr. *Winterbotham*, for *Sowdon*.

Mr. *Raymond*, and Mr. *Method*, for *Grayston*, submitted that the claim was barred by the *Statute of Limitations;* and that, under sects. 74 and 162 of the *Companies Act*, 1862, the discharge by the liquidator was a release of all claims against him.

Mr. *Baggallay*, Q.C., Mr. *Jolliffe*, and Mr. *Cleave*, for the representatives of *Powell*:—

All *Powell's* assets have been applied in payment of his debts; and we ought not to have been brought here simply to attend the proceedings.

There is no evidence that *Powell* took any part in the acts complained of; and though trustees are liable for the acts of their co-trustees, directors are not. Directors are bound by the decision of a majority of their number.

Mr. *Charles Hall*, for the representative of *Edwards*:—

This is an attempt to combine a number of actions of deceit; but it cannot succeed. Each shareholder has a separate case, and must bring it forward independently.

Sir *Roundell Palmer*, in reply:—

Wherever the shareholders of a company could, before the winding-up of a company, have instituted legal proceedings, the official liquidator may, with the sanction of the Court, also institute proceedings on their behalf after the winding-up. In this case the sanction of the Court has, in fact, been given, and it is unnecessary to allege that in the bill. Where the company was incorporated, the official liquidator may use the company's name in legal proceedings; but the *Companies Act*, 1862, does not incorporate for the purposes of winding-up a previously unincorporated

(1) 2 Dr. & Sm. 561. (2) 4 D. M. & G. 711.

company. It is therefore necessary in such cases for the official liquidator to sue in his own name. Sect. 203 does not apply to the present case. It is permissive only: it merely enables the Court to make a vesting order. Further, it applies only to cases in which the company in its corporate character had a cause of suit. The official liquidator is, by sect. 95, to do everything necessary for winding up the company and distributing its assets. Winding up does not cease until everything belonging to the company is got in, the debts paid, and the rights of the contributories adjusted: see sects. 38, 102, 109. Here we say that assets which ought to have been in the coffers of the company have been improperly withdrawn, and the official liquidator seeks to get them back. That is clearly within the scope of his duties.

The directors of a company, whether incorporated or not, are the servants of the whole body of shareholders, and any suit to impeach their management of the company's affairs must be on behalf of the whole body. It is idle, therefore, to speak of the directors being left at the mercy of single shareholders.

The Scotch cases cited in the opening were decided on broad principles common to the law of *England* and *Scotland*. No authority has been cited against the views there expressed. *Ernest* v. *Weiss* (1) is an apparent exception; but, in truth, there was in that case no company to be dealt with at all. It was a case under the Winding-up Acts of 1848 and 1849. Now, associations for forming companies were not within the Act of 1848, but were dealt with by the Act of 1849; but the only way in which they could be dealt with was by making calls on such members of the association as were liable for its debts. *Ernest* v. *Weiss* was a suit to charge the members of such an association with assets alleged to have been misapplied. It was held that, under the provision of the Winding-up Acts, the official liquidator had no power to institute such a suit as that.

It has been said that directors are not trustees—that they stand in no fiduciary relationship to the shareholders—but that they are mere agents, and the only remedy against them is a mere legal demand for a legal tort; but there is no authority for such a proposition as that, and in this Court directors have always been

(1) 2 Dr. & Sm. 561; 9 Jur. N.S. 145

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treated as trustees. In the case of *York and North Midland Railway* v. *Hudson* (1), the Defendant *Hudson*, no doubt, put into his own pocket the whole benefit he derived from his trusteeship. Here, the directors, not entirely disregarding their own interest, have sought to confer an illegitimate benefit on the shareholders, but the principles in law are the same in all such cases. The whole property of the company is at the disposal of the directors: they must deal with it according to the directions contained in the deed of settlement, and if they do not, they must be liable in the same way in which any other trustees would be. That is the principle of the case of the *Charitable Corporation* v. *Sutton* (2), which was relied on by Lord *Cottenham* in *Attorney-General* v. *Wilson* (3). The assets of the company have been lost by the acts of the directors: we desire to be recouped.

It is said that you cannot recal what is innocently paid and received; that you can only take these payments into account in finally adjusting the accounts. If that be so, the principle may be applied here. It has been necessary to make extensive calls for payment of the debts. The debts have been paid: the rights of the contributories have now to be adjusted. These rights cannot be altered by the payment of the debts. The form of decree which would do justice would be this: take an account of the losses of the company; inquire whether any and what part of the sums so lost were received by the shareholders; inquire what shares would be receivable on payment of all debts but for these losses; let so much of such share as has been received be set off in the account.

It is no answer to say that the company ought to have been wound up in 1842. Clause 108 of the deed of settlement is a continuing clause; and what was done in 1842 ought to have been done in each succeeding year.

It is said that the directors did not know that the balance sheet were false. That is no answer, even if it be true. They took upon themselves the duty of making out true accounts each year, and it does not lie with them to say, "we did not know whether the accounts we published were true or false."

(1) 16 Beav. 485. (2) 2 Atk. 400.
(3) Cr. & Ph. 1; see p. 28.

Apr. 18. LORD ROMILLY, M.R. :—

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This is a suit instituted by the official liquidator of the *Herefordshire Banking Company*, suing on behalf of the company, to make the Defendants liable for certain breaches of trust, and to compel them to repay to the shareholders the losses occasioned to them by reason of the misconduct of the directors.

Before I proceed to deal with the merits I have to consider the technical objections raised to the frame of this bill. It is argued that the Plaintiff does not fill the character necessary to entitle him to sue: that the official liquidator in his character as such cannot file such a bill: nay more, that the company itself could not institute such a suit; and that the shareholders, if anybody could, can alone institute such proceedings. This unquestionably depends on the statute. In the case of a going company, to use a technical expression, if it appears that the directors have been guilty of gross and culpable breaches of trust which cannot be set right by a public meeting of the company, two or three of the shareholders may, on behalf of themselves and all shareholders of the company other than the Defendants, sue the directors and make them responsible for their misconduct. This is true; but when a company is in course of liquidation, and the rights and interests of all persons in the matter are confided to the care of the Court, I am of opinion that in that case the power to do this, and to make the culpable persons liable to redress their ill deeds, rests with the official liquidator, who in such matters is to act under the direction of the Court. The words of the 95th section are, that the official liquidator shall have power with the sanction of the Court "to bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company." For the purpose of determining whether the objection be valid or not I am, of course, bound to assume that a case of gross misconduct exists on the part of certain directors. If this be so, I am of opinion that this circumstance entitles the official liquidator, acting with the sanction of the Court, to institute proceedings in the name of the company to redress them.

The objection is put in this form: It is said that this is a suit on behalf of the company and that the company *quà* company is not injured by this act, that it is a loss and injury to the shareholders,

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but none to the company in its character of company. But this is carrying the technical doctrine of the Court as to the *quasi* personification of a company to an extent which, in my opinion, it will not bear. In truth, except for the technicality of representing a corporation, or *quasi* corporation, as a thing by itself, the shareholders are the company, and although in a going concern it is necessary in suits which relate to it that the company should be represented in its *quasi* corporate character because the company has a separate existence as such, this is not the case after an order has been made to wind up the company, for, in fact, by such an order the company has ceased to exist except for the purpose of being wound up. It has only a qualified existence, such as Lord *Eldon* said of partnerships after dissolution; the connection still remains until the affairs are wound up, but only for the purpose of effecting this object. And it consequently follows that the official liquidator suing on behalf of the company represents the shareholders, although the interests of the company *quà* company—that is, in its *quasi* corporate character—have ceased to exist. Accordingly, after such an order has been made the power of the shareholders to institute such a suit in their own names, or in the name of the official liquidator without the sanction of the Court, ceases to exist. An objection of this character is founded on a species of personification, and gives to an abstract term called a company a being and an interest distinct from the persons who constitute the company. But if this be so before the liquidation, after the order for liquidation has been made there is no such distinct interest, for the company *quà* company is dead. In this case the interests of all the shareholders *quà* shareholders are exactly the same, and are duly represented by the official liquidator suing on behalf of the company, who, if he succeed in making a Defendant who is both a director and shareholder repay a sum of money in his character of director, also obtains for him some addition to his share in his character of shareholder. The suit is right, therefore, in point of form, and it is not less so in point of substance, for if the official liquidator could not, under the sanction of the Court, take such proceedings, the clause in the statute would be a dead letter, and a director who had embezzled the funds of the company might hold them securely without fear either of being punished by a criminal

indictment, or of being compelled by a civil proceeding to restore the property he had taken away.

In my opinion, therefore, this suit is properly instituted by the proper Plaintiff in a proper manner for the purpose of recovering for the shareholders who constituted the company, which existed up to the time of the winding-up order, the money, if any there be, which has been unjustly or improperly kept or squandered by those who had the management of it.

It remains for me now to consider the facts, and to ascertain whether in truth the Defendants have been guilty of such misconduct in wasting the assets of the banking company as entitles the shareholders, who, morally speaking, are the real Plaintiffs in this suit, to redress.

The bank itself was formed in October, 1836, under the Act of 7 Geo. 4, c. 46. The nominal capital was £300,000, in 12,000 shares of £25 each. The deed of settlement bears date the 1st of October, 1836. It provides for the number of directors, and describes their powers; it directs how the minutes are to be kept; clause 53 I will read presently when I come to another part of the judgment. The 89th clause directs the delivery of a balance sheet to the shareholders, and clause 91 directs the dividends to be paid out of the clear profits of the company; clause 92 provides for the creation of a surplus fund; clause 94 provides for the holding of general meetings of the company; and clause 108 is in these words:—[His Lordship read it.] The company began to carry on business in 1836; 4584 shares were allotted, on each of which £12 10*s.* was paid up. The bank never seems to have carried on its business prosperously, and in 1842 a special meeting of shareholders was held for the purpose of considering their position, when by a resolution passed by them a reduction of 50*s.* per share was made from the capital of the company for the purpose of clearing off the bad debts of the concern. After this the business of the company was continued to be carried on until it stopped payment in June, 1863, and it was afterwards wound up under an order of this Court in November, 1863.

No acts of the directors are complained of previously to the year 1846. At that time *William Crowther*, the son of a former director, was elected a director; and the Defendants *Sowdon* and *Grayston*

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were directors at that time, and continued to be so until the winding-up order was made. Mr. *Crowther* died in 1865, and his representative, Mr. *Marshall,* is one of the Defendants to this suit. There were four other directors who acted during a part of that period. Colonel *Powell* became a director in 1844, and continued so until his death in March, 1856; his son and representative is a Defendant to this suit. Mr. *Smeeton* became a director in 1855, and continued so until his death on the 14th of February, 1864, after the order was made to wind up this company. His representatives, Mr. *Watson* and Mr. *Wrangham,* are Defendants to this bill. Mr. *Edwards* became a director on the 7th of February, 1849, and continued so until his death on the 31st of July, 1851. Mr. *Higgins* was the only other gentleman who acted as director during any part of this period. He died in 1860 insolvent, and his representative has not been made a party to this suit.

The charges against the directors are distinct, and must be separately considered. I shall first notice the complaints made of the misconduct of the directors in rendering false accounts, and in representing the concern to be in a very different position from that which it really held; and proof is given which, in my opinion, is very conclusive and distinct, that the accounts furnished and published to the shareholders were grossly inaccurate. Convincing proof is also given that the managing directors were well aware of this fact. I am also of opinion that the other directors, who may not have examined the books, must be taken to be liable for all the consequences which would properly flow from the fact if they had been acquainted with the contents of them. It was their duty to be so acquainted, and it was a duty which they had undertaken to perform by becoming directors; and therefore I am of opinion that they are also responsible for the falsity of the accounts. But I am of opinion that I cannot make this the subject of any decree in this Court; by which I do not mean that this Court could not take the accounts again, and compel the directors to refund any money due from or retained by them. But this is not the case alleged. It is simply that they gave a favourable aspect to matters which they ought not to have done, but not that they derived any advantage by so doing. This may or may not have injured some particular shareholder. It would be a very good

ground for removing the directors if it were a going company; but how the shareholders as a body were injured by this act, and the extent of the injury, is a matter which the Court could never satisfactorily ascertain. It is not general to all. It would or might affect some more than others, and it would require investigation in each particular case. Any one of the shareholders who has been injured by this course of proceeding may be entitled to proceed individually against the directors who have so acted in the same manner as a stranger who had been induced by their representation to take shares in the company might proceed against them, but that is not, and cannot be, the subject of a suit of this character, in which I have only to consider whether the directors, in their character of directors, or *quasi* trustees, have committed breaches of trust against the shareholders which have injured the whole body alike.

I can illustrate my meaning more fully from a striking fact in this case, which is alleged in the pleadings, proved in the evidence, and most pointedly confirmed by the cross-examination of the gentleman injured, and to which fact great prominence has been given in the argument before me; I mean the conduct of the directors to Mr. *Skey*. He attended the annual meeting on the 6th of February, 1856. He put a series of questions to the directors which, if correctly answered, would have shewn that the bank was insolvent at that time, and that it ought to have been wound up forthwith. A series of answers wholly inconsistent with the real state of the case was given to these questions by the directors, and by these false answers Mr. *Skey* was induced to believe that the bank was a thriving and prosperous concern, and to invest money in the purchase of many shares in addition to those he held already. This has necessarily resulted in a very heavy loss to him. I cannot doubt that if those directors who so acted were alive they would be personally liable to Mr. *Skey* for the injury they occasioned to him by the false statements then made. But it is manifest that this cannot be the foundation for any relief to be given in this cause. It injured him, and those who, relying on the words of the directors, bought additional shares, but it injured, at least directly, no one else, and to some extent it benefited those who sold their shares. It may be difficult to speak tem-

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perately of conduct of such a character pursued by gentlemen holding such a position, but still the injury is confined to those who acted on these statements, and it does not affect the general body of the shareholders. It is on this principle that the falsification of accounts, and the paying of dividends out of capital, cannot, in my opinion, be made the foundation of a decree of this Court in the present stage of these proceedings, but can only constitute a ground for separate and distinct actions against the directors, in which the special damage and the amount of it would have to be made out in each case.

These observations appear to me to apply to every part of the Plaintiff's collection of charges against the directors, with two exceptions, which require more minute investigation. These are: first, the directors not having acted on the 108th clause in the deed of settlement which I have read; and, secondly, the loan of £8000 to Mr. *Higgins*.

First, as to the duty of the directors: under the 108th clause of the deed of settlement, which I have already read, this is imperative; it is not that the directors *may*, but that they *shall*, call a special general meeting of the proprietors. Of course, when the meeting is held, the shareholders may, if they please, enter into a fresh contract of partnership, or resolve to go on under the old contract; but the duty of the directors is plain and explicit. Two questions arise: First, did the event occur to meet which this section was provided? and, if it did, did the directors obey the directions contained in the clause and call the meeting? It is clear, on examining the books, that the first event did occur, and it is clear on the evidence that the directors did not call any meeting in pursuance of the directions contained in this clause. What is the excuse that is offered? The first is, that they did not know the state of the company, or the contents of the books. I have already dealt with this. I repeat, that the evidence shews that the managing directors did know the state of the books, and that all the others must be taken to have been fully acquainted with that which it was their duty to become acquainted with. The next defence adduced on behalf of the directors is, that in truth the company came to an end at the meeting in 1842, when the capital was reduced by £2 10*s.* per share, and that since then it

has been a new company carried on under a new agreement, and not subject to the same rules. In my opinion this defence fails. Assuming, which I do, that after the meeting and the proceedings of the shareholders in 1842, the company was a new company, and that they entered into a new contract of partnership, I am of opinion that the new partnership agreed to go on under the old rules, as set out in the original deed of settlement, and that all the shareholders who afterwards became such, or who accepted any dividends after the meeting of 1842, and every person who became a director after that time, did so on the faith of the deed of settlement and the clauses therein contained being applicable to and regulating the new partnership, and as governing all their proceedings. Indeed the evidence is distinct that they all acted on the faith of this being so, and it is impossible to eliminate one rule, and say that this had no application, while all the others had, and, consequently, as soon as a loss to the amount stated in the 108th clause had occurred it was the duty of the directors to call a general meeting of the company and lay the state of the bank before the shareholders, and my opinion is that if their having failed to do so has occasioned loss to the shareholders and the company generally, they are entitled to compel the directors to make good to them the loss occasioned by their having failed to perform the duty which they had undertaken to do. This appears to me to be distinct from the former matters I have referred to, and to be one which may have injured all the shareholders alike in that character, and therefore that an inquiry must be directed to ascertain whether such an injury of the general body of the shareholders has been sustained.

The second point on which, in my opinion, the directors are liable to the shareholders is in the matter of the loan to Mr. *Higgins*. The 53rd clause in the deed of settlement is to this effect:—[His Lordship read it.] Mr. *Higgins* was elected a director in 1849; he ceased to be a director in July, 1858. During the nine years that he was a director, in open violation of the clause I have read, the directors advanced to him or allowed him to overdraw his account to an extent amounting to an unsecured balance exceeding £8000, and he died in 1860 insolvent, and owing the company £8134 2*s.* 11*d.* In my opinion this was a clear breach of trust, and one which the persons who were directors during those

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nine years, from 1849 to 1858, are bound to make good, if alive, and which the estates of those who have since died are liable to replace. I cannot look at the acts of directors as different in this respect from those of ordinary trustees. They undertake for a valuable consideration—a paid salary—to perform a duty for certain persons, and for this purpose they undertake to hold and employ the money of those persons who trust them; one of the promises they make is, that they will not lend money to any one of themselves without taking such precautions as will practically make loss impossible. They do nothing of the sort. They take no precaution, no security, and they throw away the money of those who have trusted them, by giving it to one of their own body. Are they not to make it good? I think they are, and that the old rules of equity do not require any aid from the dictum of Lord *Cottenham* in *Wallworth* v. *Holt* (1), where he states that it is the duty of the Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances to decline to administer justice, and to enforce rights for which there is no other remedy; but that the first principles of equity make the directors of a joint stock company liable to the shareholders where, for the benefit of one of themselves, they have violated one of the express rules of the company to which they undertook to conform.

I am, therefore, prepared to make a declaration that the directors for the time being, and the estates of those who are dead, are liable to make good such losses as may have been sustained by the shareholders by reason of the directors not having summoned a special meeting of the company when, subsequently to 1846, the losses of the company had exhausted the whole of the surplus fund, and also one-fourth part of the paid-up capital of the shareholders, and also by reason of advances made to *Higgins* while a director of the company; and I will refer it to Chambers to inquire whether any and what losses have been sustained by the shareholders by each of such transactions respectively. I shall also make the usual consequential directions as to the accounts to be taken of the estates of deceased persons against their legal

(1) 4 My. & Cr. 619.

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personal representatives who do not admit assets. On this part of the subject it is only necessary I should observe that I consider that the compromise between *Grayston* and the official liquidator had reference only to his liability as a shareholder to the creditors of the company, and had no reference to his liability as a director to the shareholders of the company. I had to consider this question, or one exactly like it, in the case of *Stainton* v. *Carron Company* (1), where my view was confirmed by the Lords Justices. I am of opinion that the costs must follow the event, if it shall appear that the directors or their estates shall ultimately be declared liable to pay the sums ascertained to be due from them, but till then I can make no order as to costs, which must be specially reserved.

Solicitors for the Plaintiff: Messrs. *Bower & Cotton.*

Solicitors for the Defendants: Messrs. *Clarke, Woodcock, & Ryland*; Messrs. *Peacopp & Watson*; Mr. *Fortune*; Mr. *Driver*; Messrs. *Smith, Guscotte, & Wadham.*

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Equitable Mortgage by Trustee without Notice—Rights of Cestui que Trust—Priority—Delivering up of Deed as against a bonâ fide Purchaser without Notice.

A trustee of funds, invested on a mortgage in his name, deposited the deeds, without notice of the trust, to secure an advance to himself:—

Held, that the *cestuis que trust* were entitled to priority over the equitable mortgagee, and to delivery up of the deeds.

Joyce v. *De Moleyns* (2) commented on.

THE Plaintiffs in this suit, Mrs. *Newton* and her infant children, sought to establish their right to the hereditaments comprised in two several properties, in priority to the equitable mortgagees, *Benjamin Webster* and the *London and Westminster Bank*, who had charges on the two properties respectively, without notice of the Plaintiffs' interest, and with whom the mortgage deeds were deposited. The facts, so far as material, were as follows:—

(1) 29 L. J. (Ch.) 587; 30 L. J. (Ch.) 713. (2) 2 J. & Lat. 374.

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Under a post-nuptial settlement, dated the 12th of November, 1856, a sum of £4361 consols was held by trustees, of whom *Henry George Robinson* soon became the survivor, upon trust for the separate use of Mrs. *Newton* for her life, and after her death for her husband for his life, and after the death of the survivor for the children of the marriage.

In 1860, *Robinson*, having sold out the whole of the trust fund, advanced to *Newton*, the husband of the Plaintiff, Mrs. *Newton*, £2000, being part of the trust fund, to enable him to purchase an estate from one *Marshall*. After the purchase was completed, by an indenture of the 7th of August, 1860, *Newton* mortgaged the estate to *Robinson*, to secure the repayment of the sum so advanced.

By an indenture of the 24th of December, 1860, after a recital that the £2000 so advanced was part of the trust fund, *Robinson* covenanted with Mrs. *Newton* and her husband that he should hold the sum secured by the said mortgage upon the trusts of the settlement.

In May, 1861, the Defendant *Webster* advanced to *Robinson* £1000, in consideration for which *Robinson* gave him a memorandum charging his interest in the property comprised in the mortgage to him of the 7th of August, 1860, and deposited the mortgage deed with him, without notice of the trust.

In 1861 *Newton* purchased another estate of Messrs. *Wingrove & Budds*, for £1100. It was alleged by the Plaintiffs, but denied by the Defendants, that this sum was also advanced out of the trust funds by *Robinson*.

By an indenture of the 25th of September, 1862, *Newton* mortgaged to *Robinson* the estate purchased by him of *Wingrove & Budds*, as a security for the sum of £1100 before advanced to him, but the deed contained no reference to the said sum being part of the trust fund.

On the 8th of November, 1862, *Robinson* deposited the last-mentioned mortgage with the *London and Westminster Bank*, to secure certain advances made by them, without notice of the trust.

The bill prayed:—First, an account of what was due to the Plaintiff, Mrs. *Newton*, in respect of her interest in the trust fund:

Secondly, that *Robinson* might be decreed to pay the amount so due to her, and to make good the sum of £4361 consols: Thirdly, a declaration that the Defendants *Webster* and the *London and Westminster Bank*, respectively, had no interest in the said mortgages of the 7th of August, 1860, and the 25th of September, 1862, or either of them, or the properties therein comprised, as against the Plaintiffs' claim as *cestuis que trust* of the settlement, and that they respectively were not entitled to any benefit therefrom until the whole of the trust fund was replaced; and, as part of the consequential relief, that the Defendants *Webster* and the *London and Westminster Bank* might be decreed to bring the title deeds in their possession into Court.

The Defendants, the equitable mortgagees, submitted that, as they had acquired their respective mortgages as *bonâ fide* purchasers, without notice that the money advanced by *Robinson* was not his own, the Plaintiffs were not entitled to priority, or to have the deeds delivered up, except upon redeeming.

Mr. *Southgate*, Q.C., and Mr. *Everitt*, for the Plaintiffs:—

The money advanced by *Robinson* on both the mortgages was part of the trust fund. In the case of the sum of £2000 advanced to *Newton* to enable him to complete his purchase from *Marshall*, it is stated in the deed of the 24th of December, 1860, that it was part of the proceeds of the £4361 consols; and the sum of £1100, advanced on the occasion of the purchase from *Wingrove & Budds*, was also, as the evidence clearly shews, part of the same fund. That being so, the rights of the Plaintiffs as *cestuis que trust* must in both cases prevail over *Webster* and the *London and Westminster Bank*, though they had no notice, and notwithstanding their possession of the deeds. There is no proof of negligence on the part of the Plaintiffs.

In *Manningford* v. *Toleman* (1), where bankers took from a customer an equitable mortgage by deposit of title deeds, the property comprised in which was subject to a trust of which they had no notice, and the deposit was made in breach of that trust, it was held that the trust must prevail against the bankers' lien. The same principle was recognised in *Cory* v. *Eyre* (2).

(1) 1 Coll. 670. (2) 1 D. J. & S. 149.

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In *Stackhouse* v. *Countess of Jersey* (1), which was a very similar case to the present, a trustee in whose name a trust fund was invested on mortgage, fraudulently deposited the mortgage deed with the Defendants, who had no notice of the trust, to secure a debt of his own; there the *cestui que trust* was held to be entitled to the fund in priority to the Defendants. So in *Baillie* v. *M'Kewan* (2), where *A. B.*, in whom a lease was vested, deposited it by way of equitable mortgage with his bankers, who afterwards received notice that he was only a trustee, and they subsequently obtained from him a legal mortgage, your Lordship held that the *cestuis que trust* were entitled to priority. The purchaser of an equitable estate cannot be in a better position than the purchaser of a *chose in action*, against whom a prior interest must prevail: *Harford* v. *Lloyd* (3).

In the present case, the legal estate is in *Robinson*, the wrongdoer, and the question is whether the Plaintiffs or the equitable mortgagees have the better equity. We submit that the earlier equity—namely, that of the Plaintiffs—must prevail. The case of *Joyce* v. *De Moleyns* (4) will probably be relied upon by the other side. That case was commented on in *Stackhouse* v. *Countess of Jersey* (5), where, after stating that he considered the *cestuis que trust* to be entitled to a declaration of priority as between them and the Defendants, Vice-Chancellor *Wood* observed: "If *Joyce* v. *De Moleyns* goes so far as to decide that no such declaration could be made against a purchaser for value without notice, I confess I am not disposed to follow it to that extent."

We contend that the Plaintiffs are entitled, not only to a declaration of their priority, but to the delivery up of the deeds; for, in all cases between two equitable claimants, where the Court establishes the priority of one, the decree gives all the consequential relief: *Allen* v. *Knight* (6); *Phillips* v. *Phillips* (7).

Mr. *Roxburgh*, Q.C., and Mr. *Townsend*, for the Defendant *Webster*:—

The case of *Joyce* v. *De Moleyns* is a clear authority estab-

(1) 1 J. & H. 721.
(2) 35 Beav. 177.
(3) 20 Ibid. 310.
(4) 2 J. & Lat. 374.
(5) 1 J. & H. 731.
(6) 5 Hare, 272.
(7) 31 L. J. (Ch.) 321.

lishing the right of a person claiming as purchaser for valuable consideration without notice, and who has possession of the deeds. This was also the view of the Court in *Attorney-General* v. *Wilkins* (1), where your Lordship observed: "It is not equitable for a person who has bought for valuable consideration, without notice of any claim, to be deprived of that for which he has paid his money; nor will the Court (as expressed by Lord *Eldon* in *Wallwyn* v. *Lee* (2), and as was also said in *Joyce* v. *De Moleyns* (3)) give any assistance against a purchaser for valuable consideration without notice, to a party claiming under him."

The same principle was recognised by Lord *Westbury* in *Eyre* v. *Burmester* (4), where his Lordship observed, that "a purchaser for valuable consideration without notice will not be deprived by a Court of Equity of any advantage at law which he has fairly obtained for his protection."

Mr. *Jessel*, Q.C., and Mr. *Langworthy*, for the *London and Westminster Bank*:—

The evidence fails to shew that the sum of £1100 advanced by *Robinson* on the security of the mortgage of the 25th of September, 1862, was not his own money. If so, there is no case as against the *London and Westminster Bank*. But assuming that the money so advanced was part of the trust fund, the Plaintiffs' equity cannot prevail, for, though the bank took only an equitable security, yet as regards the deeds deposited with them, they have a legal interest in them, and are entitled to retain them as against the Plaintiffs' claim. This is established by *Joyce* v. *De Moleyns*.

Mr. *Wells*, for another mortgagee, who disclaimed.

Apr. 20. LORD ROMILLY, M.R.:—

The question in this case is, whether the Defendants, *Benjamin Webster* and the *London and Westminster Bank*, or either of them, had priority over the interest of the Plaintiffs in the mortgage

(1) 17 Beav. 285, 292.
(2) 9 Ves. 24.
(3) 2 J. & Lat. 374.
(4) 10 H. L. C. 90, 103.

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securities of the 7th of August, 1860, and the 25th of September, 1862, or either of them.

I will first consider the case of *Webster;* and on this I entertain no doubt of the right of the Plaintiffs.

These are simply equitable interests, and in such cases the prior interest must prevail over the subsequent. The fact that the owner of the subsequent equitable interest had no notice of the prior interest when he advanced his money, and took his security, does not affect the question. He could not take from the person who gave the charge on his interest more than his interest, and he could not give a charge on the interest of another person.

I agree with Lord Justice *Knight Bruce,* when he asked whether since the case of *Evans* v. *Bicknell* (1) there had been any case where the prior interest had been postponed to a later interest where *mala mens* was not an ingredient. Of course, fraud vitiates every transaction. But in the absence of negligence that amounts to guilt, the prior charge must take effect over the subsequent one. The only question therefore in this case, in my opinion, is this:— Was the money which was advanced by *Robinson* for the purpose of purchasing the estate from *Marshall* trust money? This is put beyond doubt by the deed of the 24th of December, 1860, which is five months prior to the advance made by *Webster,* and the memorandum given to him by *Robinson,* charging his interest in the £2000 mortgage. *Robinson's* interest was, in fact, nothing, and the charge operated on nothing.

A question here of considerable importance is raised, and is said to be established by the case of *Joyce* v. *De Moleyns* (2), which is to this effect, viz., whether, assuming that the person entitled to the prior charge is entitled to a declaration to that effect, he is entitled to have the deeds delivered up which were deposited with the second incumbrancer, or in what manner the equity of the first incumbrancer must be worked out.

In my opinion, after consulting the various authorities on the subject, the way in which it is to be worked out is exactly the same as if the subsequent incumbrancer had taken the charge with full knowledge of the prior one, and consequently it depends upon whether the person creating the charge in favour of the subsequent

(1) 6 Ves. 174. (2) 2 J. & Lat. 374.

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claimant had any interest whatever in the subject matter which he proposed to charge. If he had, then the person in whose favour he has created this latter incumbrance, and who has got possession of the title deeds belonging to the estate, may hold them until he is redeemed or foreclosed; and in such cases the Court will not go into the question of the greater or lesser amount of the prior charge, but if he had a beneficial interest in the property or a right to redeem it, that is sufficient to give the last incumbrancer a right to hold the deeds. But this is not so, if the person proposing to create the charge had no interest whatever in the subject matter which he proposed to charge.

For instance, if the equitable owner of an estate creates a first charge on it in favour of *A.*, and a second in favour of *B.*, and a third in favour of *C.*, to whom he delivers up the custody of the title deeds, whether this order of priorities is originally undisputed, or whether it is settled by the decree of the Court, *C.* cannot be compelled to deliver up the title deeds until he is foreclosed or redeemed, because there is a possibility of interest in the estate remaining to him after payment of *A.* and *B.* But the case is otherwise where there is not any interest, or possibility of interest, in the property vested in, or possessed by, the holder of the title deeds of the property who pretends to create the charge. He passes no *scintilla* of interest to the person to whom he delivers them, and that person is, in my opinion, compellable to deliver them up to the rightful owner.

To illustrate the case by the instance I have already given: Suppose the owner of an equitable estate for value conveys the whole estate to *A.*, and then does the same to *B.*, and again conveys the whole estate to *C.* for valuable consideration, having, in fact, nothing whatever to convey to *B.* or to *C.*, then neither *B.* nor *C.* can, in my opinion, hold the title deeds of the property against *A.* But the Court will, on declaring who is the real owner, declare that *B.* or *C.* shall deliver up to *A.* the title deeds belonging to that estate, of which *A.* is the sole and exclusive owner. To apply that to the case before me, *Robinson* was mortgagee for £2000, he executes a deed declaring that this £2000 was the money deposited with him as trustee, and that consequently the mortgage was held by him as trustee for his *cestuis que trust.* When, there-

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fore, he gave *Webster* a charge on this he gave him a charge on what was not his to charge, any more than if he had given him a charge on the estate of a client whose title deeds happened to be deposited with him for a day for the purpose of preparing some marriage settlement or deed of family arrangement. It gave nothing to *Webster*. The deed of mortgage was not *Robinson's* property, and the delivery of it gave nothing to *Webster*, and he cannot hold it against the real owner, consequently the Court declares that *Webster* took nothing, and could take nothing, in the mortgage which *Robinson* held in trust for the Plaintiffs, and, consequently, that the mortgage deed must be delivered to the Plaintiffs.

[His Lordship then examined the evidence as to the sum of £1100 advanced by *Robinson* being part of the trust fund, and held that it was proved to be so, and, consequently, that the *London and Westminster Bank* were in the same position as *Webster*.]

Mr. *Jessel* endeavoured, on *Joyce* v. *De Moleyns* (1), to raise the case I have already commented upon in referring to *Webster's* claim, and he contended that though the *London and Westminster Bank* have only an equitable security, yet that as regards the deeds deposited, that is, the parchments themselves, they have a legal interest in them which cannot be taken from them. But the defect in this reasoning seems to me to be the assumption that they have an equitable incumbrance on the mortgage, whereas if I am right they have no incumbrance on it at all. I think that there is no interest in the parchment as distinct from the land to which it relates, and although I do not doubt that in some cases, as I have already stated, a person may hold deeds relating to a property where, having regard to the comparative value of the property charged and the prior charges, his interest is merely nominal, yet in that case he has a *scintilla* of interest which entitles him to hold the deeds, but when he has no charge at all, then he is not at liberty to hold the deeds against the rightful owner of the property, and I find nothing laid down in *Joyce* v. *De Moleyns* which, when fairly examined, tends towards defeating this doctrine.

The Lord Chancellor there states that the holders of the deeds

(1) 2 J. & Lat. 374.

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cannot maintain possession of them against the true owner of the estate, and I, relying on this, and on the observations of Lord Justice Sir *W. Page Wood*, in *Stackhouse* v. *Countess of Jersey* (1), with which I fully concur, consider that they cannot hold those deeds in the present case. I do not think that it is the doctrine of this Court to send the Plaintiffs to law to recover possession of these deeds against the Defendants. I must, therefore, make a decree establishing the Plaintiffs' priority in both cases, and giving them the possession of the deeds. The costs will follow the event, that is, the Defendant *Webster* will have to pay the costs so far as relates to the purchase from *Marshall*, and the *London and Westminster Bank* so far as relates to the purchase from *Wingrove*.

Solicitor for the Plaintiffs: Mr. *R. H. Pearpoint.*

Solicitors for the Defendants: Mr. *W. S. Webster;* Messrs. *Roy & Cartwright.*

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M. R.
1868
April 22, 24;
July 9.

Railway Company—Liability of Directors of a Company whose Functions have ceased—Suit by Preference Shareholder on behalf of himself and all other Shareholders—Representation of other Classes of Shareholders.

Suit by a preference shareholder in a railway company, with three classes of shareholders, on behalf of himself and all other shareholders, against the directors, alleging that the undertaking had some years previously been sold to another company, from whom a sum of stock had been received by way of consideration, more than sufficient to pay the liabilities of the company, and that the functions of the company had ceased; and praying an account against the directors, that the surplus might be divided among the shareholders, and the company wound up:—

Held, that the directors were liable to account for the funds remaining in their hands, and that the Plaintiff was entitled to a decree, subject to the shareholders whose interests were different from the Plaintiffs' being represented before the Court.

THIS was a suit by the Plaintiff, who was a preference shareholder in the *St. George's Harbour Company*, on behalf of himself and all other the shareholders of the company (except the directors)

(1) 1 J. & H. 721.

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against the directors and the company as Defendants, seeking to make the directors liable to account for moneys which they had received, and to obtain a distribution of assets among the shareholders.

The company was incorporated by the *St. George's Harbour Act*, 1853, authorizing the raising of capital, and the construction of a harbour and railway at *Llandudno Bay*, and the powers were extended by the *St. George's Harbour Amendment Act*, 1855.

By the *St. George's Harbour Act*, 1861, after reciting that the railway had been constructed, and that the undertaking of the company then consisted of the railway, station, and pier, but that the powers of the company in relation to the harbour had become extinct, it was provided that the railway and other property of the company should be transferred to the *London and North Western Railway Company*. This transfer was effected on the 1st of January, 1866, previously to which date £62,500 stock of the *London and North Western Railway Company* was issued in the name of the *St. George's Harbour Company*, as a consideration for the transfer.

The bill alleged that since the transfer the company had ceased to carry on business; that the directors had applied a part of the £62,500 stock in payment of liabilities of the company, and that a portion was then standing in the name of the company; that the balance was more than sufficient for the payment of the company's debts; and that the Plaintiff and the other shareholders were entitled to the surplus of the stock after satisfying such debts and liabilities; that since the passing of the last Act no meeting of the shareholders had been held, nor had the directors rendered any account of their receipts and payments, nor had any dividend been declared; that the directors having refused to render any account to the shareholders of the company, it was necessary that it should be wound up, and its liabilities ascertained, and the residue divided.

The bill alleged that the shareholders were too numerous to be made parties to the suit, and that they all, except the Defendants, the directors, had a common interest with the Plaintiff in the subject matter of the suit. The shareholders consisted of the ordinary shareholders and two classes of preference shareholders.

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The bill prayed that the directors might be directed to account as trustees for the said sum of £62,500 stock of the *London and North Western Railway Company*, and as to their dealings therewith; that the liabilities might be ascertained, and that, after providing for the same, the surplus of the stock might be divided rateably among the shareholders, according to their interests, and the company wound up under the direction of the Court.

The directors, by their answer, set forth an account of their dealings with the said stock, and of the way in which it had been applied in payment of the liabilities of the company. They admitted that the amount then standing in the name of the company was more than sufficient to satisfy the remaining debts, but submitted that they had no power to divide such surplus without the consent of every shareholder; that the suit was instituted without the authority of the company or the shareholders; that the interest of the Plaintiff, who was a £5 per cent. preference shareholder, was antagonistic to that of the other classes of shareholders; and that the Court had no jurisdiction to entertain such a suit. They denied the Plaintiffs' allegation that they had refused to render an account.

Mr. *Baggallay*, Q.C., and Mr. *Caldecott*, for the Plaintiff:—

The directors are bound to render a proper account to the shareholders, as trustees of the sum of stock issued in the name of the company on the transfer to the *London and North Western Railway Company*. Even as regards a going concern the directors of a company are in the position of trustees, *à fortiori* when, as here, the business of the company has wholly ceased. In *Williams* v. *Page* (1) it was held that the managing committee of a projected company, as well as the directors after its formation, were trustees for the shareholders, and liable to account as such. The case of *Foss* v. *Harbottle* (2), which is usually cited in similar cases, has no application to the present. In *Gregory* v. *Patchett* (3), which was a suit by the Plaintiffs on behalf of themselves and the other shareholders, seeking to make the directors, who were alleged to have done acts *ultrà vires*, liable to replace the funds of the com-

(1) 24 Beav. 654. (2) 2 Hare, 461.
(3) 33 Beav. 595.

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pany, the Court made a decree for the dissolution of the company and the winding up of its affairs.

The Plaintiff, though a preference shareholder, sufficiently represents all classes of shareholders of the company up to decree, and also after decree. In the case of *In re London India Rubber Company* (1), where there were two classes of shareholders, the *A.* and the *B.* shareholders, and the *A.* shareholders, who contributed all the capital, were to receive the whole of it out of the profits, with interest, before anything was paid to the *B.* shareholders, it was held, on the winding-up, no profits having been realized, that the assets must be distributed *pro ratâ* between the two classes.

In *Hoole* v. *Great Western Railway Company* (2) Lord *Cairns* considered that when it was necessary that a bill by a member of a company against a corporation to restrain them from doing an illegal act should be filed on behalf of himself and other persons, it was enough for the Plaintiff to file his bill on behalf of the section in which he was a shareholder, as the other sections were sufficiently represented by the corporation.

Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for the Defendants:—

As a general rule a shareholder in an ordinary company cannot file a bill to make the directors account without the sanction of a general meeting: *Foss* v. *Harbottle* (3). The only exception is where a Plaintiff seeks to restrain directors from doing acts *ultrà vires* and in cases of fraud. In the present case the Plaintiff cannot ask for the interference of the Court. *Gregory* v. *Patchett* (4) does not apply, for it cannot be said that this company has wholly ceased; it has only changed its character, and it appears that in that case the decree went beyond what was warranted by the judgment of the Court.

This is practically a suit to wind up a corporation. The *Companies Act*, 1862, alone gives the Court jurisdiction to wind up an incorporated company, and the 199th section expressly excepts railway companies incorporated by Act of Parliament from its provisions, and this is, in fact, a railway company, for it is the purpose of the company, and not the possession of the line of rail-

(1) Law Rep. 5 Eq. 519.
(2) Ibid. 3 Ch. 262, 272.
(3) 2 Hare, 461.
(4) 33 Beav. 595.

way, which is the test. Even in the case of an abandoned railway the Court will not entertain a suit for dissolution.

The *Railways Abandonment Act*, 1850 (13 & 14 Vict. c. 83), only applied to railways incorporated at that time, and though its provisions were extended by sect. 31 of the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), yet that does not give the Court jurisdiction to wind up a company in such a case as this. We submit that there is no ground for making a decree for an account, as there is no allegation of the funds being misapplied, and the balance cannot yet be ascertained.

Apr. 24. LORD ROMILLY, M.R.:—

I am of opinion that the Plaintiff is entitled to a decree, but at present I think the bill is wrongly constituted as regards the parties.

The case may be stated thus, assuming for a moment that no Act had been passed for the winding up of companies:—An Act is passed enabling certain persons to form a railway and a harbour, and they are constituted a corporation for making and maintaining that railway and harbour. By a second Act, their powers are extended. They are unable to carry on their works, and a third Act is passed, reciting that their powers had become extinct, and authorizing the transfer of their undertaking to another company, which is accordingly effected; the property is sold, and after providing for all the liabilities of their own company, the directors have a balance of several thousand pounds in hand. Can it be said that there is no remedy, and that they are entitled to keep this money for themselves?

The proposition amounts to this, that, unless the Act of Parliament gives a remedy, there is none. I consider that they are trustees for the members of that body which was once a corporation, but which has become extinct, and this Court, making all due and just allowances to them, may call on the directors to pay the money, and divide it among the persons entitled, as though no Winding-up Act had ever passed.

This case does not, in my opinion, come within the 199th

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section of the *Companies Act*, 1862, nor within the *Railways Abandonment Act*, 1850 (13 & 14 Vict. c 83), or the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127). None of these Acts were intended to supersede the principles of Equity, but only to assist the Court, by giving additional powers to enable persons to enforce equities without those peculiar difficulties arising from the number of shareholders and from the rules of Equity, which theretofore had made it impossible for persons in such cases ever to get to a decree.

I am of opinion that there cannot be a plainer equity than this, that where the functions of a corporation have ceased the managers of that corporation are bound to account for all moneys belonging to the corporation, and when such moneys are improperly retained this Court will make a decree in order that they may be divided among the various members.

As, however, there are in this case three classes of shareholders, and the Plaintiff claims priority over two of the classes, one of which, the ordinary shareholders, are sufficiently represented by the directors, I will allow the bill to be amended, and the case to stand over in order that the other class of preference shareholders may be represented, and then they may raise the question of priority under the decree, and, if they require it, ask for leave to put in an answer.

July 9. The bill having been amended by making one of the other class of preference shareholders a Defendant, the case was again mentioned.

Mr. *Whitbread*, for the Defendant, added by amendment.

MINUTES:—Declare that the £62,500 stock was applicable to the payment of the debts and liabilities of the company; inquire how the said sum has been applied, and under what circumstances; inquire what debts and liabilities of the company now remain unsatisfied: reserve further consideration.

Solicitor for the Plaintiff: Mr. *W. A. Greatorex.*

Solicitors for the Defendants: Messrs. *Hume & Bird;* Messrs. *Dean & Taylor.*

COLES *v.* BRISTOWE.

V.-C. M.

1868

March 18, 20, 21; *May* 2.

Company—Specific Performance—Sale of Shares—Custom of Stock Exchange—Brokers and Jobbers—Winding-up before Transfer.

On the 9th of May the Plaintiff, through his brokers, sold 200 shares in *O. G. & Co.* to the Defendants, who were stock-jobbers, the settling-day being the 15th of May. On the 10th the company stopped payment, and the Petition for winding up was presented on the 11th of May. The purchase-money was paid by the Defendants on the 15th, and the certificates of the shares were then delivered by the Plaintiff, and transfers were executed by him to seventeen persons as nominees of the Defendants. The transfers could not be registered in consequence of the winding up of the company:—

Held, upon bill for specific performance, that the Defendants were bound to fulfil the contract, to repay the amount of calls paid by the Plaintiff, and to indemnify him against future calls.

THIS was a bill filed for the purpose of enforcing the specific performance of a contract to sell 200 shares in *Overend, Gurney, & Co.* The Plaintiff was, in May, 1866, the registered owner of shares in that company, and instructed Messrs. *Sutton & Co.*, his brokers, to sell such shares. In pursuance of those instructions, Messrs. *Sutton & Co.*, on the 9th of May, 1866, sold 200 of the shares to the Defendants, Messrs. *Bristowe & Co.*, who were jobbers on the *Stock Exchange*. Messrs. *Sutton & Co.*, on the same day, informed the Plaintiff by letter of the sale which they had made of the shares on his behalf for the 15th inst., which was the next settling-day, at the rate of $2\frac{5}{8}$ discount.

By a subsequent sale-note it appeared that the total amount of purchase-money was £2475 for the 200 shares, which sum was paid by cheque by the Defendants to Messrs. *Sutton & Co.* on the 15th of May, and the certificates of the shares were then handed over to the Defendants. Shortly before the settling-day the Defendants, according to the usual custom of the *Stock Exchange*, forwarded to the firm of *Sutton & Co.* the names of seventeen persons to whom they desired the 200 shares to be transferred, in unequal numbers, the highest amount of the purchases being twenty-five shares and the lowest five shares. These seventeen persons resided in various parts of the country, and were entire strangers to the Plaintiff and his brokers. *Overend, Gurney, &*

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Co. stopped payment on the 10th of May. The Petition for winding up was presented on the 11th, and under that Petition and subsequent orders the company was now being wound up under the supervision of the Court. In consequence of the order for winding up it had become impossible from that period to register any transfers of shares. The transfers had been executed by the Plaintiff, but not by any of the seventeen persons so nominated by the Defendants, and the Plaintiff's name remained upon the register of the company as the owner of the 200 shares. He had since been placed upon the list of contributories in respect of these shares, and two calls of £10 each had been made upon him by the official liquidators, amounting to £4000, which he had been obliged to pay.

The bill prayed that the Defendants might be decreed specifically to perform the contract, and that they might be ordered to procure the execution of the seventeen deeds of transfer by the several transferees therein named, or themselves to execute a proper deed of transfer of the 200 shares as transferees thereof, and to procure the said 200 shares to be effectually transferred into, and registered in, the names of the Defendants, or their nominees, in the register of members of the company, or to obtain an order for the rectification of such register accordingly; and also to repay to the Plaintiff the calls already paid by him, and to pay all future calls which should be made upon the said shares before the registration of such transfers.

The Plaintiff, in his affidavit, stated that, according to the custom and course of business on the *Stock Exchange*, there were two days in every month called settling-days, and the purchase-money of £2475 ought to have been paid "on the 15th of May, 1866, which was the settling-day next after the day on which such purchase was made, and accordingly the Defendants, in part performance of the contract, on the 15th of May, 1866, or the following day, did pay to *Sutton & Co.* the sum of £2475 as the purchase-money of the 200 shares, and received through them the certificates of the whole of the shares which had previously been in his possession." He also stated "that, as a matter of convenience, it was usual, in transactions for the purchase of shares, for the broker of the last buyer to pay the purchase-money to the broker of the first vendor,

and to leave him to settle any difference of price with intermediate parties, yet on this occasion, and in reference to the sale of the 200 shares to the Defendants, he specially instructed his brokers not to have anything to do with any sub-purchasers from the Defendants, and not to recognise them except as nominees of the Defendants, and not to receive payment for the shares from any such sub-purchasers, but to receive such payment direct from the Defendants themselves, being the parties to whom he had sold the shares."

Mr. *Pitman*, the member of the firm of *Sutton & Co.* who acted in the matter of the sale of the 200 shares, confirmed the evidence of the Plaintiff, and stated that he had carried out the Plaintiff's instructions in every respect, and had delivered the transfers direct to the Defendants, and received the purchase-money from them by cheque upon their bankers. It was a right which every broker on the *Stock Exchange* had, if he chose to exercise it, to have the transfers delivered direct to the buying jobber instead of to the broker for the transferee, and some generally did so. That shortly before the settling-day the Defendants forwarded to the firm of *Sutton & Co.* the names of seventeen persons, to whom they desired the 200 shares to be transferred in unequal numbers. These persons resided in various parts of the country. *Sutton & Co.* knew nothing whatever of these seventeen persons. They were entire strangers to their firm, and it was not part of their duty to make inquiries as to the responsibility of these persons.

It was stated by the Defendants that they were jobbers and dealers in shares; that there was a difference between a broker and a jobber, the former buying shares for others while the latter bought for himself. They stated that by the usage of the *Stock Exchange*, on the settling-day the buyer gave to the seller the names and addresses of the persons to whom the shares were to be transferred. The seller was then bound to accept the names so given, and when the shares were paid for and a name given, the jobber was absolved from all further liability, and was not bound to see that the transfer of the shares was executed by the transferee, or that it was registered, or to indemnify the seller against future calls. If, however, the jobber failed to give a name, then he was bound to accept a transfer of the shares himself.

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Several members of the *Stock Exchange* gave evidence as to the distinction between brokers and jobbers, and as to the rules of the *Stock Exchange*. It was stated that a jobber sometimes dealt on behalf of an undisclosed principal, but generally on his own account. He usually made up daily accounts, balancing the purchases and sales of each day, but sometimes he dealt in particular securities for the settling-day. That a vendor was entitled to demand payment direct from the jobber, according to the rules of the *Stock Exchange*, and the jobber was not entitled to say that the vendor must get his money from the ultimate purchaser. There was a name-day and a settling-day: on the former day it was customary for the jobber to give the names of the purchasers to whom he desired the transfers to be made, and the money was paid and the transfer executed on the settling-day. It was not the duty, nor was it the custom, of brokers to inquire into the solvency or responsibility of the transferees. There could not be a refusal on the part of the broker to accept the nominees of the jobber, but a transfer into the name of the jobber could not be insisted upon; if that were so the whole machinery of the dealings on the *Stock Exchange* would be put a stop to.

Mr. *Glasse*, Q.C., and Mr. *J. N. Higgins*, for the Plaintiff:—

The question in this case has already been decided by the Court of Common Pleas in *Grissell* v. *Bristowe* (1), where the circumstances were precisely similar to this case, and there the Court held that the usage of the *Stock Exchange* as to the setting off of shares as between the jobbers was not, even if proved (which they thought it was not), such a general, well-known, and reasonable custom or usage as to bind the Plaintiff, and, consequently, that the Defendants were liable under their contract for not having indemnified him against the subsequent call.

The contract in this case was made on the day before the firm of *Overend, Gurney, & Co.* stopped payment, and was a valid contract. The Plaintiff relied solely on the Defendants, whom he knew to be responsible persons. He had no power of ascertaining the responsibility of the Defendants' nominees, who were total strangers to him. Here the Defendants nominated seventeen

(1) Law Rep. 3 C. P. 112.

transferees, but he might have named 200, and in that case the burden on the Plaintiff would have been intolerable. This question, as to a transfer to nominees, was settled by the decision in *Paine* v. *Hutchinson* (1), and in that case, upon an appeal by the Plaintiffs (2), the Lords Justices added a direction similar to that in *Evans* v. *Wood* (3), for the Defendant to indemnify the Plaintiffs from all liabilities which the Plaintiffs should have incurred by reason of the shares not having been registered in the Defendant's name. And in *Hawkins* v. *Maltby* (4) the Lord Chancellor decided that the fact of a call having been made in the interval between the contract and the transfer did not invalidate the contract. The case of *Sheppard* v. *Murphy* (5) confirms this view of the law, though the bill was dismissed on the ground of there being no privity between the vendor and purchaser. If a broker gives the name of his principal that relieves him from liability, but a jobber only gives names of persons to whom the shares which he has himself contracted for as principal, are to be transferred. The usage of the *Stock Exchange* is only intended to bind the members, but it cannot alter the law, or exempt a purchaser from the liability which the law imposes upon every purchaser under the contract. This case cannot be put in any way in which it is not covered by authority, and the two cases of *Grissell* v. *Bristowe* (6), and *Paine* v. *Hutchinson*, taken together, exactly make out the Plaintiff's contention.

There are also, the cases of *Chapman* v. *Shepherd* (7); *Biederman* v. *Stone* (8); *Barned's Banking Company* (9); and *Walker* v. *Bartlett* (10), which support the Plaintiff's case.

Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Whitehorne*, for the Defendants:—

There are two questions in this case, namely, what was the effect of the contract, and what influence the custom of the *Stock Exchange* has upon the contract?

It is not in controversy here, as it was in *Grissell* v. *Bristowe*,

(1) Law Rep. 3 Eq. 257.
(2) Ibid. 3 Ch. 388.
(3) Ibid. 5 Eq. 9.
(4) Ibid. 3 Ch. 188.
(5) 1 I. R. Eq. 490.
(6) Law Rep. 3 C. P. 112.
(7) Ibid. 2 C. P. 228.
(8) Ibid. 504.
(9) Ibid. 3 Ch. 105.
(10) 18 C. B. 845.

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that the Plaintiff was ignorant of the rules of the *Stock Exchange*. It is admitted that he had full knowledge of its usages, and therefore entered into the contract intending it should be governed by the rules of the *Stock Exchange*. This case in that respect differs from *Grissell* v. *Bristowe* (1) and *Paine* v. *Hutchinson* (2). This contract was entered into on the 9th of May, but to be completed on the 15th, which was the settling-day. It was, therefore, a contract that the Defendants would, on the 15th of May, pay the purchase-money for the shares, and would place in the hands of the vendor the names of the persons to whom the transfer of the shares was to be made. There could be no complete performance of the contract till that transfer was effected. The vendor, on his part, contracted to sell and transfer the shares on a particular day, but on that day he was not in a position to perform his contract, for the company having stopped payment on the 9th, and the Petition for winding up having been presented on the 10th of May, it became impossible for the Plaintiff to register any transfer of shares, without which a legal transfer could not be effected. Even if the company had not stopped payment, the directors would have had power, under the regulations of their company, to refuse registration of the transfers, and no contract for sale of shares in a company having such regulations can be complete until the transfers are accepted. In *Ward and Henry's Case* (3) the Lords Justices refused to rectify the register where the directors had declined to register a transfer; and Lord Justice *Cairns* thought that the Court had no power to interfere in such a case, but only where the register was incorrect through default on the part of the company; and a similar decision was made by the Master of the Rolls in *Bermingham* v. *Sheridan* (4). In such cases the contract would fail for want of authority in the vendor to sell, and the completion of the contract being prohibited by the company, it could not be carried into effect. The Defendants in this case were ignorant of the fact that the company would be wound up before the completion of the contract; therefore, under the authority of *Emmerson's Case* (5), it cannot be enforced. It may be

(1) Law Rep. 3 C. P. 112. (3) Law Rep. 2 Ch. 431.
(2) Ibid. 3 Eq. 257; 3 Ch. 388. (4) 33 Beav. 660.
(5) Law Rep. 1 Ch. 433.

inferred also from the case of *Clarke* v. *Dickson* (1), that in such a case as this the Defendants might avoid the contract, although there were circumstances in that case to disentitle the claimant to succeed.

Paine v. *Hutchinson* (2) is a totally different case from this, for the transfer was not registered, through the default of the purchaser, and the delay continued for several months, the company in the meantime was wound up, but the suit was instituted long before the winding-up. The vendor himself had done all that was possible to effect the transfer, but the purchaser failed on his part. So in *Sheppard* v. *Murphy* (3) the contract was complete many days before the winding-up. In *Musgrave and Hart's Case* (4) it was not a bill for specific performance, and this question was not raised. In *Shaw* v. *Fisher* (5) specific performance was refused. The laws of the country deprived the vendor of the power of making a title to what he contracted to sell, consequently the contract cannot be enforced.

The payment of the purchase-money might also have been resisted if it had not been for the regulations of the *Stock Exchange;* but the fact that the jobber is bound by the laws of the *Stock Exchange* to pay the purchase-money, does not alter his legal or equitable liability in other respects; and an Act of Parliament provides that no transfer can be legally effected after the winding-up.

Then as to the regulations of the *Stock Exchange.* The payment by the Defendants is not to be considered as a recognition by them of any legal obligation to make it, but as a mere compliance with the rules of the *Stock Exchange,* which treats all its members as principals *inter se* as to contracts entered into, and renders all who do not perform them liable to expulsion. The payment was made to avoid that penalty, but it does not render the Defendants personally liable to the Plaintiff. The contract was performed when the money was paid and the transfers executed. *Grissell* v. *Bristowe* (6) also differs from this case in respect of its being an action for damages; that the facts are not identical

(1) E. B. & E. 148.
(2) Law Rep. 3 Eq. 257; 3 Ch. 388.
(3) 1 I. R. Eq. 490.
(4) Law Rep. 5 Eq. 193.
(5) 5 D. M. & G. 596.
(6) Law Rep. 3 C. P. 112.

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with this case; and that the contract was entered into the day after the failure of the company, and the parties could not have contemplated an absolute transfer.

Mr. *Glasse*, in reply.

May 2. SIR R. MALINS, V.C.:—

It is clear that on the 9th of May there was a valid and binding contract for the sale and purchase of the shares in question, between the Plaintiff as principal on the one side, and the Defendants as principals on the other; and it is clear, I think, that this contract would have been carried into effect if it had not been for the stoppage of the company, which took place on the 10th of May.

The purchase-money for the shares, amounting to £2475, was paid to *Sutton & Co.*, on behalf of the Plaintiffs, by the cheque of the Defendants, on the 15th. This would seem to be a distinct recognition of the validity of the contract as the contract of the Defendants, and a most material part performance of it. But it was contended by the Defendants' counsel that this payment is not to be considered as a recognition by them of any legal obligation to make it, but as a mere compliance with the rules of the *Stock Exchange*, which treat all its members as principals *inter se* as to all contracts entered into, and render all who do not perform them liable to expulsion, and it was said that it was merely for the purpose of avoiding that penalty that the payment was made.

If this had been a contract for the sale of stock or shares in a company paid up in full, it is obvious that the transaction would have been completed upon the receipt of the purchase-money by the Plaintiff, and the executions of the transfers to the nominees of the Defendants, but as the shares in *Overend, Gurney, & Co.* were £50 shares, upon which £15 only had been paid, and to which, therefore, the liability to pay the remaining £35 attached, the question is, upon whom that liability is to fall? Not one of the transfers has been executed by the transferees, and on that account, and also on account of the difficulty if not impossibility of

obtaining an alteration in the register of shareholders after the commencement of the winding-up, the Plaintiff's name still remains on the register, and he has been placed on the list of contributories, and two calls having been made of £10 each, he has been obliged to pay them, to the amount of £4000, in respect of these 200 shares, and the object of the suit is to compel the Defendants to repay that sum, and to indemnify the Plaintiff against future calls, if there should be any. The cause, therefore, raises a question of the highest importance, not only to the members of the *Stock Exchange*, but to the public at large. If the Defendants are right in their contention that they are not personally liable to the Plaintiff, it follows that the public can never know with whom they contract, or to whom they are to look for the performance of contracts for the purchase of shares in joint stock companies, in which the payment of the purchase-money is frequently a mere trifle as compared with the importance of being indemnified against future calls, which is the right of the seller arising out of such contract. That point is very clearly decided in the case of *Walker* v. *Bartlett* (1). In the present case the Plaintiff was well satisfied with the contract of the Defendants, because he knew they were responsible men who would be sure to perform their contract in all its parts. But if he is bound to be satisfied with the seventeen persons to whom the Defendants say they handed him over (and they might just as well have been 200 persons, that is, a different person in respect of each share), it is obvious that his position is very different. All those seventeen persons were entire strangers to him. Mr. *Pitman*, in his cross-examination, said it was no part of the business of his firm, as the brokers of the Plaintiff, to make inquiries as to the sufficiency of those persons, and that he made no inquiry as to their solvency or respectability, and it was contended for the Defendants that the Plaintiff had ample opportunity of ascertaining their sufficiency during the ten days after the settling-day, which, by the rules of the *Stock Exchange*, is allowed for the completion of the transfer of shares. If this is the position of a seller of shares on the *Stock Exchange*, it must be admitted to be a most difficult and painful one. Every one knows the difficulty of ascertaining the pecuniary

(1) 18 C. B. 845.

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position of a single individual, but to throw upon the seller of shares the necessity and risk of ascertaining the position of seventeen, or, it may be, 200 persons, spread over different parts of the world, of whose existence he never before heard, would be intolerable. On the other hand, if the Plaintiff is right in treating the Defendants as personally liable to him, not only for the original purchase-money, which they are admitted to be, but also bound to indemnify him as against future calls on his shares, it follows that a most serious burden and risk is thrown upon the members of the *Stock Exchange*, but the effect of doing so will probably be to make them careful not to enter into such contracts unless they have reliable principals behind, a point upon which they have an opportunity of forming an opinion, but from which the seller is wholly excluded, if he is liable to be thrown upon the nominees of the jobber to whom he has sold.

This difficulty must be solved by a determination of the rights of the parties arising out of the contract apart from the difficulty caused by the stoppage of the company between the contract and the settling-day. It is perfectly established by a series of decisions of the Courts of Law and Equity that the purchaser of shares in a joint stock company is bound to indemnify the seller against all subsequent calls to which they may be liable; and as these Defendants did not on the 9th of May buy as agents for others, but as jobbers purely and simply on their own account, I am of opinion that that was the obligation which they clearly and distinctly took upon themselves by the contract, and from which no rule of the *Stock Exchange* can relieve them. The intention and object of the Plaintiff was to divest himself of all interest in these shares and of his connection with the company, and the object of the purchasers was to stand in the Plaintiff's place, and to take all advantages which attached to the shares. The object and effect of the contract is well expressed by Lord Chief Justice *Bovill* in giving the judgment of the majority of the Judges in the Court of Common Pleas in *Grissell* v. *Bristowe* (1), a case with another Plaintiff, but with these same Defendants. The Lord Chief Justice thus expresses himself on that subject (2): "The main object, and, indeed, the very essence, of a contract of sale and

(1) Law Rep. 3 C. P. 112. (2) Law Rep. 3 C. P. p. 131.

purchase in the case of shares, as it seems to us, is that one party shall divest himself of, and the other acquire in the name of himself or his nominee, the ownership of the shares, which can only be by means of a transfer properly executed by both parties, and registered, and that the seller shall relinquish and be relieved from, and the purchaser assume, all future benefits and liabilities in respect of the shares. If this be the intention of the contract, as we think it is, the admission of evidence of an usage or custom to the effect contended for by the Defendants would be entirely to alter, defeat, and nullify the contract and the intention of the parties, and would be in direct contradiction of the contract, and we are of opinion therefore that such evidence was not admissible in this case. If the evidence was admissible, the statement of it is most unsatisfactory, and, performing the functions of a jury, we should not be disposed to act upon it; but this usage or custom, even if proved, as well as the practice of settlement between the members of the *Stock Exchange*, is, as it seems to us, so entirely unreasonable for the purpose of affecting the rights of principals who are not members of the *Stock Exchange*, that we should be disposed to refuse to give any effect to it on that ground also." Such being the obligation of the Defendants, arising out of the original contract, it has been contended by their counsel that they have been discharged from it by the subsequent stoppage of the company, which rendered it impossible for the Plaintiff to deliver to them the thing which he sold, namely, a share in a going concern, the nature of such interest being that the seller must be considered as guaranteeing to the purchaser that the share shall be a transferable interest on the day fixed for the completion of the contract; and it was on this ground contended that the failure of the company entitles the Defendants to the dismissal of the bill. And it was also contended, on behalf of the Defendants, that the contract was performed when the purchase-money, £2475, was paid, and the transfers executed.

With regard to the first objection, the rules of this Court are clearly settled that the destruction or failure of the subject matter of a contract after it is entered into does not relieve a purchaser from the obligation to perform it. If the subject of the contract be a house, the price agreed to be paid for it must be paid though

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the house be burned down immediately after the contract is signed. It becomes the property of the purchaser from the moment the contract is signed, and upon him therefore all the subsequent risks of the property fall: *Paine* v. *Miller* (1).

So if an estate be sold in consideration of an annuity for a life, the estate must be conveyed though the life for which the annuity was to be paid drops immediately after the contract. So, also, if the subject matter of the contract be itself an annuity, the price must be paid though the life dies immediately afterwards: *Kenney* v. *Wexham* (2), and the authorities there cited, particularly *Mortimer* v. *Capper* (3) and *Coles* v. *Trecothick* (4); and if there be a contract for the purchase of a ship, I take it to be quite clear that the purchaser must pay the price although the ship was burnt, or foundered at sea, the day after the contract. All these cases proceed upon the principle that the purchaser becomes the owner of the thing purchased from the time of the contract, and is from that time entitled to all the advantages which accrue to it, and is bound to bear all the risks and disadvantages that may be attached to it. In the present case I think the purchasers were as much bound to know that the company in which they bought shares was liable to stop payment and be wound up, as the purchaser of a house is bound to know that it is liable to be burnt down, and that that is a risk which he takes upon himself by entering into the contract for its purchase.

In *Chapman* v. *Shepherd* (5) the point arose thus:—The Plaintiff in that case, a stockbroker, was in April, 1866, a month before the stoppage, instructed by the Defendant to purchase on his account shares in this very company. Accordingly he did so through his *London* agents, and at the request of the Defendant the transaction was carried over two or three settling-days, and ultimately till the 15th of May, *Overend, Gurney, & Co.* having stopped on the 10th. The Plaintiff having paid the money on the 18th of May on the shares, brought an action to recover it against the Defendant, and it was held that he was entitled to recover.

Whitehead v. *Izod* (6), which is reported with *Chapman* v. *Shep-*

(1) 6 Ves. 349.
(2) 6 Madd. 355.
(3) 1 Bro. C. C. 156.
(4) 9 Ves. 246.
(5) Law Rep. 2 C. P. 228.
(6) Ibid.

herd, is precisely to the same effect, and Lord Chief Justice *Bovill*, in delivering the judgment, says: "Both parties to this contract knew that the company was liable to be wound up, and must be taken to have been cognisant of the rules of the *Stock Exchange*." The same defence, therefore, was made that the contract was not binding because they sold in April what could not be delivered in May.

In *Taylor* v. *Stray* (1) the point arose thus:—The Plaintiffs, who were brokers, bought for the Defendant on the 28th of August, 1856, twenty shares in the *Royal British Bank* for the settling-day, which was on the 15th of September. On the 3rd of September, that is, twelve days before the settling-day, the bank stopped, and it was held that the Plaintiff was entitled to recover the price of the shares against the Defendant. In delivering the judgment in that case, the very point so much relied upon by Sir *Roundell Palmer*, and also by Mr. *Cotton*, received the attention of the Court; Mr. Justice *Cresswell* thus expresses himself: "The only question upon which I have entertained any serious doubt is, whether *Russell* could be said, on the 15th of September, to have tendered the things he contracted to sell, the bank having stopped payment. Upon consideration, however, I think that objection cannot prevail." And Mr. Justice *Crowder* takes up the same point, and says: "The conduct of the Plaintiffs was in strict accordance with the authority given to them by the Defendant, provided the thing tendered was that contracted for, that is, whether (the bank having stopped payment before the shares were tendered), the payment was made in respect of that which the Plaintiffs were authorized by the Defendant to purchase for him. It appears to me that it was."

In *Stray* v. *Russell* (2) the Plaintiff, who was the Defendant in *Taylor* v. *Stray*, having been obliged to pay his broker in the last action, brought an action against the Defendant *Russell*, of whom the shares had been bought, to recover back the money, and it was held that he was not entitled to recover. The same topic was there urged.

These principles and authorities, in my opinion, shew that the first objection which is taken to the performance of this contract

(1) 2 C. B. (N. S.) 175. 3 Jur. N.S. 540, 543, 964

(2) 1 E. & E. 888. 6 Jur. N.S. 869

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is not sustainable. The liability of the company to stop and to be wound up was an inseparable incident, of which both the contracting parties were equally cognisant, and it was therefore a risk to which the purchasers were bound to know they were exposed. If the shares had increased in value before the settling-day, from whatever cause, the purchasers would have been entitled to that advantage, and they are bound to bear the loss arising from the depreciation by an accident, which they were necessarily exposed to, and which was beyond the control of both parties. In other words, the Defendants bought the shares for better or worse.

The point to which I have adverted is the only difference between the present case and *Grissell* v. *Bristowe* (1), and upon the distinction that the contract was entered into after, while here it was entered into before, the company stopped, it was strenuously urged for the Defendants that the bill must be dismissed. I am unable to accede to that argument, and the consequence being that, in my opinion, the two cases are in substance the same, I think I should be bound to follow the decision in *Grissell* v. *Bristowe* even if my own judgment did not accord with that decision. In that case the Court, in a very elaborate judgment, decided that the Plaintiff was entitled to recover. Mr. Justice *Byles* dissented from their opinion; but with the utmost respect for that learned Judge I confess I am wholly unable to concur in the reasons of his judgment. With the opinion of the majority of the Judges, as delivered by the Lord Chief Justice, I entirely agree, and I desire to be understood as adopting the reasons of that decision, and I follow it in this case, not only because it is the judgment of that Court, but because my own judgment entirely concurs in it.

It is perfectly settled that a bill for the specific performance of a contract for the purchase of shares is maintainable in this Court; and there can be no doubt that in a great majority of the cases, the object is to oblige the purchaser to indemnify the seller against the liabilities attached to the shares in the shape of calls or otherwise.

[The Vice-Chancellor then referred to the following cases in support of this principle. *Wynne* v. *Price* (2), where specific per-

(1) Law Rep. 3 C. P. 112. (2) 3 De G. & Sm. 310.

formance was decreed, with a direction that the Defendant should indemnify the Plaintiff against the calls he had paid, as well as future calls. *Robins* v. *Edwards* (1), where Lord *Chelmsford*, in confirming the judgment of the Master of the Rolls, said: "If the transfer cannot be made, there can be no doubt that the Plaintiffs are entitled to an account of the calls which they have paid, and to an indemnity against future liabilities." *Shepherd* v. *Gillespie* (2), in which specific performance was decreed. *Evans* v. *Wood* (3), where the Master of the Rolls decreed specific performance, with payment of calls and indemnity against future calls; and *Paine* v. *Hutchinson* (4), where, on appeal, the Lords Justices affirmed the decision of Vice-Chancellor *Stuart* (5) decreeing specific performance, but made a material addition, directing that the Defendant should indemnify the Plaintiff against calls already made and to be made. The case of *Hawkins* v. *Maltby* (6) he considered to have no material bearing upon this case; and in *Sheppard* v. *Murphy* (7) the Petition was dismissed on the ground that there was no privity between the Plaintiff and Defendant, and not on the ground of its not being a case for specific performance. *Shaw* v. *Fisher* (8) was not a decision contrary to the principle of specific performance of a purchase of shares. It was only because the Plaintiff put himself in a position of not being able to give the Defendant what he contracted for that the bill was dismissed. His Honour then continued:—]

The result is, that the Defendants are, in my opinion, bound to perform the contract which they entered into with the Plaintiff on the 9th of May, 1866. That contract remains unperformed, while the Plaintiff remains liable to pay calls. It was urged that the contract was performed when the transfers to the seventeen nominees of the Defendants, or rather the seventeen sub-purchasers, were executed. That was a point considered and decided against the Defendants in the case of *Grissell* v. *Bristowe* (9); but if it had not been there decided, I should have come to the conclusion that it was not a performance of the contract, but a mere

(1) 15 W. R. 1065.
(2) Law Rep. 5 Eq. 293.
(3) Ibid. 9.
(4) Ibid. 3 Ch. 388.
(5) Law Rep. 3 Eq. 257.
(6) Ibid. 4 Eq. 572; 3 Ch. 188.
(7) 1 I. R. Eq. 490.
(8) 5 D. M. & G. 596.
(9) Law Rep. 3 C. P. 112.

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arrangement for the convenience of the Defendants. The Defendants asked the Plaintiff to transfer to seventeen other persons, as their nominees, and it turns out that the Plaintiff has been unable to induce any one of those persons to execute the transfers, and that contract is wholly incomplete. The contract has only partly been performed by the payment of the original purchase-money. So far as regards the other obligations undertaken by the contract in other respects, it remains wholly unperformed; and I am of opinion that it would be a mere colourable pretence to say that the execution of the transfers, for the convenience of the Defendants, to the persons to whom they sold at different prices, could in any respect be regarded as a performance of the contract. Calls to the extent of £20 per share, in consequence of the Defendants not having performed their contract, have been paid, and the sum so paid must be repaid with interest, and the Defendants must indemnify the Plaintiff against any future calls; the Defendants must, of course, pay the costs of the suit. The decree will be the same as in *Paine* v. *Hutchinson* (1), with the addition made by the Lords Justices.

In making this decree it is satisfactory to know that the decisions at law which I have cited will enable the Defendants to recover against their seventeen principals, to whom they resold the shares. The cases I have referred to are cases in which actions have been successfully maintained in every instance in which the brokers have bought shares for other persons.

I am happy, also, to say, that although the indemnity will extend to future calls, in substance they will have nothing more to pay than the £4000, because it is a matter of certainty, I believe, that in *Overend, Gurney, & Co.* it will not be necessary to make any further calls.

The rate of interest must be £4 per cent., in conformity with what was done in *Evans* v. *Wood* (2).

Solicitor for the Plaintiff: Mr. *A. Jones.*

Solicitors for the Defendants: Messrs. *Lewis, Munns, & Co.*

(1) Law Rep. 3 Eq. 257; 3 Ch. 388. (2) Law Rep. 5 Eq. 9.

LANGTON *v.* WAITE.

V.-C. M.
1868
Feb. 24, 29.

Principal and Agent—Mortgage of Stock—Custom of Stock Exchange—Whether identical Stock must be returned.

A. & B., stockbrokers, borrowed, on behalf of the Plaintiff, a sum of money, for a term of three months, from the Defendants, who were also stockbrokers, upon the security of certain railway stock, which was transferred by the Plaintiff into the name of one of the Defendants' firm. At the expiration of the term the loan was repaid with interest, and the Defendants, who, pending the loan, had sold the Plaintiff's stock, purchased other stock, and re-transferred a similar amount to the Plaintiff. The Plaintiff claimed to be entitled to the amount of profit which the Defendants had realized:—

Held, that the Plaintiff was entitled to sue as principal in the transaction; that the Defendants were not justified, either by law or by the custom of the *Stock Exchange*, in parting with the security during the currency of the loan, but were bound to return the identical stock pledged; and that the Plaintiff was entitled to recover from the Defendants the amount of profit realized by their dealings with the stock.

IN December, 1865, the Plaintiff, *Charles Langton*, borrowed, through his stockbrokers, *Price & Pott*, from the Defendants, *Foster & Braithwaite*, also stockbrokers, a sum of £6000 for three months, at 7½ per cent. interest, upon the security of £22,000 *Grand Trunk of Canada Railway* stock, which was transferred by the Plaintiff, and registered in the name of the Defendant, *Henry Waite*, one of the members of the firm of *Foster & Braithwaite*, on the 6th of January, 1866. In the middle of February, 1866, the Plaintiff contracted to sell the £22,000 stock at 42 per cent. To enable him to complete that contract he applied to the Defendants, *Foster & Braithwaite*, through his agents, *Price & Pott*, to allow him to pay off the £6000, with the full amount of interest (six weeks having elapsed) up to the 28th of March. That application was made by *Price & Pott* on behalf of their principal, but not naming him, in a letter dated the 16th of February, 1866. This application was declined by the Defendants, on the ground that the *Grand Trunks* were negotiated for the account at the end of March. In consequence of this refusal by the Defendants, before the expiration of the three months the Plaintiff was obliged to pay to his purchaser the difference between the

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price at which he had sold the stock and the price at which the same amount of stock was subsequently bought by the purchaser, which was 46 per cent., that difference being £880. The Plaintiff, in pursuance of his contract, repaid to the Defendants the sum, £6000, with interest, at the expiration of the three months, and they re-transferred £22,000 similar railway stock into the name of the Plaintiff on the 28th of March, 1866. The Plaintiff subsequently discovered that the Defendants had, on the 14th and 15th of February, 1866, two days before their refusal to accept payment of the loan, sold the stock so deposited with them at the price of about 46 per cent., and had afterwards re-purchased other stock at a much lower price, that is, at about 30 or 32 per cent., which re-purchased stock was that which was re-transferred to the Plaintiff at the expiration of the loan, by which it appeared that the Defendants had made a profit of about £3000 by the loan transaction.

The bill prayed that an account might be taken of the money produced by the sale, and the Plaintiff claimed to be entitled to the profit realized by the Defendants.

The Defendants, by their answer, stated that they had no knowledge of the Plaintiff in the transaction, but had dealt only with Messrs. *Price & Pott.* They alleged it to be the custom on the *Stock Exchange,* that when a loan was made for a fixed period on the security of any kind of stock to be transferred into the name of the lender, that he should have full power to deal with it in any manner he thought fit during the period of the loan; and that it would be wholly unnecessary, in an agreement for any such loan, to specify that the lender was to have such power, inasmuch as it was always implied, unless an express stipulation to the contrary were introduced, which was sometimes done; and that the Defendants would never have entertained the idea of a loan at so low a rate of interest as £7 10*s.* per cent. for a fixed period, unless they had the power to deal with the securities during the time. The Defendants further alleged that they had acted in accordance with the rules and custom of the *Stock Exchange.*

The evidence consisted, on the part of the Plaintiff, of the affidavits of the Plaintiff and Mr. *Price,* and several brokers and jobbers on the *Stock Exchange.* On the part of the Defendants

there were affidavits by themselves and several other brokers and jobbers as to the custom and rules of the *Stock Exchange*, and some of the witnesses were cross-examined *vivâ voce*. The important portions of the evidence of these witnesses are referred to in the Vice-Chancellor's judgment.

Mr. *Cotton*, Q.C., and Mr. *Morris*, for the Plaintiff:—

The Plaintiff gave no authority for dealing with the stock during the currency of the loan, and no such custom as alleged by the Defendants exists. It is proved that the Plaintiff's stock was transferred during the currency of the loan, and, according to the case of *Ex parte Dennison* (1), a transfer by the pledgee during the continuance of the pledge, whether for the purpose of raising money or by way of sale, must be treated as a sale, and the Plaintiff is, therefore, entitled to charge the mortgagee with the price of the stock as at the date of the transfer. The Plaintiff was the principal in this transaction, and his brokers, *Price & Pott*, were only principals so far as the *Stock Exchange* was concerned, and were subject to the rules of the *Stock Exchange*, but this does not affect the right of the Plaintiff to sue as the real principal.

It makes no difference that the name of the principal was not disclosed at the time of the bargain: *Smith's* Mercantile Law (2). This is supported by the case of *Grissell* v. *Bristowe* (3); and in *Mortimer* v. *M'Callan* (4) an undisclosed principal contracting through a stockbroker was made liable. So in *Paterson* v. *Gandasequi* (5), it was held that if the principal is not disclosed at the time of the contract made by the agent, the principal or the agent might be sued, at the election of the seller, and the same principle was acted upon in *Addison* v. *Gandasequi* (6). There is no doubt that in this case the Defendants, who were jobbers, perfectly well knew that *Price & Pott* were acting for a principal, because such is the custom of brokers, but if *Price & Pott* are to be treated as principals, then they will have the same remedy against the Defendants that the Plaintiff has, consequently the case comes to the same in either view.

(1) 3 Ves. 552.
(2) 3rd Ed. p. 134.
(3) Law Rep. 3 C. P. 112.
(4) 6 M. & W. 58.
(5) 15 East, 62.
(6) 4 Taunt. 574.

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As to the custom of the *Stock Exchange*, the evidence of the brokers who have been examined varies considerably, but it seems to be admitted that the pledgee must, upon re-payment, re-transfer the identical security deposited, if it can be identified, but that when it cannot be identified it is sufficient to re-transfer the like amount of the same stock. This custom is, in fact, laid down by the 64th rule of the *Stock Exchange*. In this case the stock can easily be identified by the numbers on the certificates. It cannot be denied that, in the absence of express contract, the pledgee of property is bound to hold it in such a state that it may be returned intact when the debt for which it is held is paid off. And if it should be disposed of, the owner has a right to charge the holder with the amount he has obtained for it. In this case there is no express contract which can vary the established law. The alleged custom on the *Stock Exchange* to the contrary is disproved as far as regards stock of this kind, though there may be some such custom as to Government stock, which cannot be identified, and such a custom as alleged, even if proved, would be bad.

Mr. *Pearson*, Q.C., and Mr. *Currey*, for the Defendants:—

The Defendants raise three material points:—First: that the Defendants dealt with Messrs. *Price & Pott* as principals, and there is no privity between them and the Plaintiff. By the custom of the *Stock Exchange* the brokers alone are recognised as the principals, and under the rules they are personally liable for the performance of their contracts. Secondly: that what was done by the Defendants was right in itself, and strictly in accordance with the contract with *Price & Pott*. Thirdly: that by the custom of the *Stock Exchange* the Defendants, as the pledgees of the stock, had a right to deal with it, in the absence of any express stipulation to the contrary, as they pleased during the currency of the loan, and were only liable to transfer, when the loan was paid off, an amount of stock equal to that which had been transferred to them when the loan was granted. The Plaintiff was quite as well aware of the custom on the *Stock Exchange* as the Defendants, and if he had desired to have a different rule applied, he might have inserted in the contract an express stipulation that the stock

should not be dealt with. The Defendants say, also, that there is no method of identifying stock.

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.:—

The demand made by the Plaintiff in this bill is resisted by the Defendants on three grounds.

With regard to the first of their objections, the law is clearly settled that a principal may sue upon a contract entered into on his behalf by an agent, although his name was wholly concealed at the time of the contract. In *Smith's* Mercantile Law (1) the rule is correctly stated to this effect.

The recent and very important case of *Grissell* v. *Bristowe* (2) also entirely supports that rule. In that case the majority of the Court of Common Pleas decided that there was that liability on the part of the Defendants, who were the jobbers, who purchased nominally from *Barry & Co.*, but in reality from *Grissell*. The case of *Mortimer* v. *M'Callan* (3) was one in which an undisclosed principal was made liable upon a similar contract through a broker on the *Stock Exchange* for the sale of stock; and many instances have occurred where, upon a member of the *Stock Exchange* becoming a defaulter, his books have been handed over to the committee of the *Stock Exchange*, or to the official assignee appointed by them, and contracts which he had made, and upon which he, as a member of the House, was personally responsible, have been enforced against his undisclosed principals, the money recovered being applied towards payment of the defaulter's debts to other members of the *Stock Exchange*. In the present case the parties were brokers on both sides, and from their very position the Defendants must have known that *Price & Pott* were merely agents for the borrower; and if there had been any doubt upon that subject it must have been removed by the production of the transfer of the £22,000 stock executed by the Plaintiff; and in the letter of the 16th of February *Price & Pott* speak of their principal. It is also to be observed that *Price & Pott* would have precisely the same remedies against

(1) 3rd Ed. p. 134. (2) Law Rep. 3 C. P. 112. Read 6 B 36

(3) 6 M. & W. 58.

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the Defendants as the Plaintiff has, if they were to be treated as principals. No injustice can therefore be done to the Defendants by their being sued by the Plaintiff as principals instead of as agents, and I am of opinion, for these reasons, that the first ground of defence wholly fails.

The 49th rule of the *Stock Exchange* is in these terms: "The *Stock Exchange* does not recognise in its dealings any other parties than its own members; every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the regulations and usages of the House; and should a principal, without the consent of the committee, attempt to enforce by law, a claim against a member of the *Stock Exchange*, the committee will decide as to the liability of the broker or agent of such principal for any cost or damages incurred in consequence of legal proceedings." The 49th rule therefore, which was relied upon by the Defendants, makes all stock-brokers principals as between themselves, but it does not take away the right of the principals to sue in respect of their own rights in their own names.

As to the second ground of defence, that the sale of the stock was in accordance with the rights of the Defendant and the contract between the parties, the law is perfectly clear; and it was not disputed by the Defendants' counsel that, in the absence of express contract, the pawnee of property cannot sell it until the debt for which it is pledged becomes payable, and, if he does so, the owner has a right to charge the pawnee with the price he gets for the property, if he finds it to his interest to do so. In the present case there was clearly no contract or right to sell the stock, and I am of opinion that the second ground of defence also fails.

The third and last ground of defence was the one mainly relied upon by the Defendants' counsel, namely, that the custom of the *Stock Exchange* gives the lender of money on security a right to sell the security whenever he thinks proper. If there be such a custom, it would be manifestly unjust: the borrower would be completely at the mercy of the lender, who might convert the security and appropriate the proceeds to his own use, and at the expiration of the period of the loan be wholly unable to return to the borrower what belonged to him. But is there such a custom?

On the part of the Plaintiff, no less than eight stockbrokers give evidence upon the subject, and they speak in very distinct terms: Mr. *Price*, who was the agent in this transaction, says "that there is no rule or custom of the *London Stock Exchange* authorizing a person by whom a loan is made for a fixed period, upon the security of stock transferred into his name, to sell such stock during the period for which the loan is made, and that stock so pledged is treated only as collateral security for the repayment of the loan." In that statement he is supported by Mr. *Zoete*, the deputy chairman of the committee of the *Stock Exchange*, who speaks in precisely the same terms, denying that there is such a custom. Then there are the affidavits of six other stockbrokers of great experience, who all speak to the same effect. This evidence is positive and distinct that there is no such custom. This is attempted to be met by the Defendants by the evidence of other stockbrokers; but, on looking at their evidence, it is in far less distinct terms, and I do not think it amounts to a contrary statement; and, indeed, it would be surprising if there were any right in the lender of money to sell the pledge. I will take, as an example, the evidence of Mr. *Scott*, who says: "As to rule 64, I have no doubt that this rule is always acted upon. A lender may transfer the security deposited with him during the currency of the loan, but when the time has elapsed the lender must transfer to the original borrower the identical security deposited. When stock has been deposited as security, there is no means of identifying the stock deposited. It is the practice at the *Stock Exchange* to deal with stock in this way: where the stock deposited cannot be identified, it is sufficient to re-transfer the like amount of stock. It is impossible to raise any objection on the want of identity on the security of stock. I have heard it stipulated that security of this description should not be transferred. In the absence of such stipulation I have never heard, before this case, a complaint that the security had been transferred. The object of such a stipulation would probably be to prevent such security being thrown on the market. Such a stipulation might very materially lessen the value of such security as a security. A dealer without this right of transfer would probably require a larger percentage on the loan. I should myself decline to lend money at all, unless I had power to make use of

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the security. In the absence of any stipulation, I consider that the lender may always transfer. According to the practice of the *Stock Exchange* the seller is bound to transfer at the price named by the buyer. If *A.* sells stock to *B.*, he is bound to transfer to *B.'s* nominee at the price *B.* chooses to name. The consideration stated in the transfer is no evidence," and so forth. Mr. *Charles Wood* says: "I have been a considerable dealer in consols. Where money has been advanced on the security of consols it is invariably the custom for the lender to deal with the consols while the loan is running. A lender would take it for granted that he had such power of transfer. I have never known it stipulated that consols should not be dealt with; business could not be carried on unless there were that power—it would require so much more capital." Mr. *Paine* and Mr. *Mortimer* speak to the same effect. These witnesses speak of using the security, which may well mean the right of transferring the mortgage or pledge—a right which is not disputed by the Plaintiff. That is, they might transfer the mortgage, or they might sub-mortgage. The lender, under such circumstances, might suddenly want his money, and it would indeed be a very hard rule, if he wanted the money he had lent for a certain purpose, if he could not transfer the security to another. That is a right that is not disputed by the Plaintiff, and that is a right that I should consider the lender of money upon any security whatever would have. But there can be no custom in opposition to an express rule. Now, I consider the 64th rule of the *Stock Exchange* conclusive upon the subject. That rule is in these few, but very distinct, words: "In all cases of loans on the deposit of security, the lender is bound to return the identical securities deposited, unless it be otherwise stipulated at the time of making the loan. But this liability does not apply to a member who has taken in stock or shares upon continuation at the market price." How can the identical security be re-transferred if the lender is at liberty to sell it? I am therefore of opinion that this rule is conclusive upon the point, and shews that the evidence of the eight brokers who have made affidavits for the Plaintiff is perfectly correct. I am of opinion that the alleged custom is in direct opposition to the express rule, and has, consequently, no existence. There is no such custom, and the rule obliges the lender to return

the identical security which is pledged for the loan. It was argued for the Defendant that the stock could not be identified, but it appears to me there is no such difficulty in identifying stock as was suggested. It is the constant practice of this Court to trace and identify stock when it has been improperly dealt with. The principle that the pawnee of stock has no right to sell, and that if he does so he must be charged with the price it produced, whatever may be the subsequent reduction in its value, is established by the case of *Ex parte Dennison* (1). That case, I take it, goes the whole length of the principle upon which I intend to decide the present case. I am therefore of opinion that the Defendants had no right to sell the stock pledged to them, and that, having done so, they must be charged as between themselves and the Plaintiff with the amount which was produced by the sale. It must be observed that, if it had not been for this wrongful sale on the part of the Defendants, they would undoubtedly have been ready to re-transfer the Plaintiff's stock in the middle of February, 1866, and he would have been saved the loss which their conduct has forced upon him. The result is, that there must be a declaration that the Defendants were not entitled to sell the £22,000 *Canada Trunk Railway* stock which was deposited with them; and there must be an account taken of what was produced by the sale. From such account there must be deducted the £6000, and interest up to the 28th of March, and the Defendants must pay the balance of the amount so found due; and the Plaintiff must, as he offers by his bill, re-transfer to the Defendants, or account to them for the value of the £22,000 stock which they re-transferred into his name; and the Defendants must pay the costs of the suit. The Defendants must also be charged with interest at 5 per cent. upon the money that is due, from the 28th of March, 1866.

Solicitors for the Plaintiff: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Defendants: Messrs. *R. & S. Mullens.*

(1) 3 Ves. 552.

V.-C. M.
1868
March 11.

LEY *v.* LEY.

Rent-charge—Apportionment according to Income not Capital—Mining and Agricultural Value.

An annuity was payable out of property, part of which comprised mines, and was settled upon the eldest son, and part was agricultural land, and was settled upon the younger children. The mining property produced a larger income, but being of a fluctuating nature, and liable to great diminution, was valued at seven years' purchase, and the agricultural property at thirty years' purchase:—

Held, that the two properties must contribute to the annuity in proportion to the actual income *de anno in annum*, and not in proportion to the capitalized value.

THIS was a special case for the opinion of the Court under Sir *George Turner's* Act.

By an indenture of settlement made upon the marriage of Mr. and Mrs. *Ley* in 1840, certain real property, part of which comprised copper and lead mines, was conveyed to trustees to the use of the husband for life, and after his decease to the use, intent, and purpose that his wife, if she survived him, should, during her life or widowhood, receive the annual jointure or rent-charge of £400, to be yearly issuing and payable out of and charged upon the hereditaments thereby conveyed, and, subject thereto, to the use of the child or children of the marriage as the husband should by deed or will appoint; and in default of appointment to the use of the child or children of the marriage as tenants in common in tail.

Edwin Ley, the husband, made his will in 1864, and thereby appointed that portion of the property which comprised the copper and lead mines to the use of his eldest son in tail, and directed that the residue, which consisted of land of an ordinary agricultural character, should go to his younger children under the trusts of the settlement.

Edwin Ley died before his wife, and there were eight children of the marriage.

The property comprising the mines, which was devised to the eldest son, produced the present annual sum of about £715; but being of a fluctuating nature, and liable to great reduction by the

probable failure of the veins of ore, it was valued at only seven years' purchase, while the residue of the property, producing an income of £220, being agricultural land was valued at thirty years' purchase.

The question now raised was, in what proportion the different properties should contribute to the payment of the annuity or rent-charge of £400 payable to the widow; whether according to the annual income or the capitalized value of the property.

Mr. *Eddis*, for the younger children:—

The apportionment of this annuity ought to be made according to the annual income of the entire property upon which it is charged. It is not a rent-charge in fee, but for a period limited to the life or widowhood of the annuitant, and consequently the proceeds for each year should bear the charge so long as it exists. There is no reported case in which the present question has been decided.

Mr. *Courtenay*, for the eldest son:—

It would be unjust to apportion the rent-charge according to the amount of the income, since the value of the mining property is of so fluctuating a nature that it may at any moment cease altogether. The valuation set upon the different properties is the surest test to go upon, and if the annuity is charged in proportion to the value when capitalized, it will work out justice between the persons entitled. Although the question has not been actually decided in any reported case, it may be argued upon analogy to the course pursued by the Government in apportioning succession duty under the Act (16 & 17 Vict. c. 51), where mining property is calculated on the footing of a life annuity. If the whole of the property were sold, it would be necessary to provide a fund for the payment of the annuity, and each child would have to set apart share of the capital in proportion to the amount realized by the sale. Whereas if the annuity is charged in proportion to the income, it will follow that the eldest son will have to contribute in proportion to the whole of his income, when, in fact, he must necessarily put by a portion of it each year to meet the contingency of the failure of the mines.

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SIR R. MALINS, V.C.:—

I am surprised to learn that the question here raised has never been the subject of decision; but as I am told by both counsel that they have been unable to meet with any case on the subject, I must assume that it is an open question. The point I have to determine is, whether the different estates are to contribute in proportion to the income or in proportion to the sum which they would realize by sale. The jointure is a charge on the income in favour of the widow from year to year, and it appears to me that the only mode in which justice can be done between the two classes of children, the eldest son, on the one hand, and the younger children, on the other, is to hold that it is a charge on the annual income; that is, that contribution is to be made from year to year, according to the income in each year. That mode of proceeding is one which will deal out perfect justice, because the life income of each estate ought to make a proportional contribution to pay this charge, the estate which produces a smaller income in a smaller proportion, and that which produces a larger in a larger contribution. The contribution will then be a fair one, because if the income becomes diminished the contribution will diminish in proportion. It is a mere rule of three sum, that is, contribution is in proportion to the actual income from year to year, and I cannot take the suggestion of what would be the saleable value into consideration. If the property were sold, and it became necessary to make a payment out of the proceeds of the sale, each class of children would necessarily pay according to the value of their proportion of the purchase-money, and each would pay according to what he got; and thus equal justice would be worked out amongst the children. There must be liberty to the guardians of the children to pay the costs, which must be paid in he same proportion.

Solicitors for the Plaintiff: Messrs. *N. C. & C. Milne.*
Solicitors for the Defendants: Messrs. *Price, Bolton, & Filder.*

COOK *v.* MAYOR AND CORPORATION OF BATH.

V.-C. M.
1868
Feb. 7, 8, 10.

Public Right—Private Injury—Form of Suit—Right of Way—Non-user—Abandonment.

Where a Plaintiff suffers a particular injury from the obstruction of a public way, a bill for an injunction will lie, and the Attorney-General need not be a party. Circumstances which amount to abandonment of an easement considered.

7 Eq 390
10 Eq 337,
16 LT D 45,
462

THIS was a motion for an injunction to restrain the Defendants from building in such a way as to obstruct a lane called *Cross Back Lane*, and later, *White Hart Lane*, in the city of *Bath*.

The Plaintiff was the owner in fee of a messuage, No. 14, *Bath Street*, which was bounded at the back by *Cross Back Lane*, leading into *Stall Street*, and it appeared that from 1793, when this house was erected, there had been a back-door leading into *Cross Back Lane*, through which the Plaintiff had access through *Cross Back Lane* to *Stall Street*. About forty years ago the then occupier of the house closed and bricked up this back-door, leaving the jambs in the wall, and keeping the old door in his cellar, but in the spring of 1864 the present Plaintiff re-opened the door, and restored it as much as possible to its former position.

In 1867 the Defendants, having purchased the house at the corner of the lane and *Stall Street*, were proceeding to erect buildings in such a way as, it was admitted, would permanently block up all access from *White Hart Lane* into *Stall Street*, and thereupon the Plaintiff filed his bill for an injunction to restrain them from so doing.

There was conflicting evidence as to whether *White Hart Lane* was a public or private way. The principal defences were the alleged abandonment of the Plaintiff's right of way by the closing up of the back-door, and the frame of the suit; other defences were raised, which do not affect the decision on the main points, and do not call for a report.

Mr. *Glasse*, Q.C., and Mr. *Charles Hall*, for the Plaintiff, in support of the motion:—

The Plaintiff in this case is entitled to pass into and through

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this road. It is true that for many years the back-door was shut up, but even if this was a private way that amounted merely to non-user for a time, and not to an abandonment of the right, to prove which there must be a manifest intention. The exercise of the right was actually resumed several years before the Defendants had incurred any expenses, and therefore the Defendants cannot set up any defence founded on that ground: *Moore* v. *Rawson* (1); *Stokoe* v. *Singers* (2); *Ward* v. *Ward* (3). The case is equally clear if this is a public way, as in reality it is, for although the Attorney-General might have sued in respect of the public nuisance, yet the Plaintiff may sue in respect of the particular private injury sustained by him: *Spencer* v. *London and Birmingham Railway Company* (4); and the Attorney-General need not be made a party: *Sampson* v. *Smith* (5).

Mr. *Cole*, Q.C., and Mr. *Ince*, for the Defendants:—

This is not a public but a private way, with license to use it in a particular manner. The back-door in respect of which the Plaintiff claims the right of way was bricked up about forty years ago, and remained closed up till about four years since, when he re-opened it; that evidenced an intention permanently to abandon the right, and he cannot set up a continuous user for twenty years, which is necessary to support a right of way. In many cases it has been held that non-user for twenty years leads to the presumption of abandonment: *Rex* v. *Lloyd* (6); *Crossley* v. *Lightowler* (7).

If, on the other hand, the lane in question is a public highway, the Attorney-General ought to have sued on behalf of the public generally, and it is not competent to the Plaintiff to sue in respect of his individual injury only.

The injury to the Plaintiff is so small that the Court will not interfere.

Mr. *Glasse*, in reply.

(1) 3 B. & C. 332.
(2) 8 E. & B. 31.
(3) 7 Ex. 838.
(4) 8 Sim. 193; S. C. 1 Railw. Cas. 159.
(5) 8 Sim. 272.
(6) 1 Camp. 260.
(7) Law Rep. 3 Eq. 279; 2 Ch. 478.]

SIR R. MALINS, V.C.:—

The most important question raised in this case is, whether the fact that the Plaintiff, or one of his predecessors, closed this back-door, and allowed it to remain so closed for at least thirty years, and only re-opened it about four years since, must be considered as an abandonment of the right of way claimed.

The law on this point is not entirely free from difficulty, but I understand the principle applicable to it to be as follows:—A right of way or a right to light may be abandoned, and it is always a question of fact to be ascertained by a jury, or by the Court, from the surrounding circumstances, whether the act amounts to an abandonment, or was intended as such. If in this case the Defendants had commenced building before this back-door had been re-opened, I should have been of opinion that the Plaintiff had, by allowing it so to remain closed, led them into incurring expense, and therefore could not prevent their acting on the impression that he intended to abandon his right.

In *Moore* v. *Rawson* (1), a very valuable case, and one analogous to the present, where a Plaintiff, having ancient windows, pulled down the wall in which they were, and built up a blank wall, and allowed it so to remain for seventeen years, and the Defendants during that period erected buildings, which they could not have done had the ancient windows remained, and incurred expense, *Abbott*, C.J., in the Court of Queen's Bench, held that the Plaintiff could not maintain an action, and directed a nonsuit; but it is clear that if there had been no buildings erected before the expiration of seventeen years, the Plaintiff might have resumed his windows, and acquired a new right of action against the Defendants. The same principle was laid down by *Erle*, J., in *Stokoe* v. *Singers* (2); and in *Ward* v. *Ward* (3); *Pollock*, C.B., and *Alderson*, B., held that mere non-user of a way did not, in the absence of the acquisition of rights by other parties in consequence of it, amount to an abandonment; but only raised the inference that there had been no occasion to use it; and in *Crossley* v. *Lightowler* (4) Vice-Chancellor *Wood* laid down the law in the same way.

That is my view in this case; and this house having been

(1) 3 B. & C. 332.
(2) 8 E. & B. 31.
(3) 7 Ex. 838.
(4) Law Rep. 3 Eq. 279.

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erected with a back-door leading into the lane, conferred on the owner as much right to use the back-door as he had to use the front-door. It is clear that if this door had remained open the whole time, although during the whole time there had only existed the right without any exercise of it, still there would have been a continuing right unless some other parties had acquired adverse rights, which would have been prejudiced by the renewed exercise of the right.

It is impossible for the Defendants to contend that there has been an abandonment when the Plaintiff actually re-opened the door four years ago, and before they had acquired any rights whatever. I am of opinion, on the authorities cited, that there has been no abandonment, but merely a non-user of the right; and that the Defendants have no right to block up one end of the lane, and compel the Plaintiff to use the other end of it only.

It may be that this is a very small matter; the Defendants contend that the Plaintiff gave only £100 for his premises, but it appears that he laid out £120 more. He is, however, the owner in fee of the house, and there is no difference in questions of right of way between small and large properties; a person blocking up a right of way must shew competent authority for so doing, and cannot enter into the question of value.

Thus far I have dealt with the case on the assumption of the lane being subject to a private right of way; but, in truth, the evidence goes far to shew that *White Hart Lane* was a public way. On this view the Defendants have contended that the Attorney-General must sue. But the cases cited are conclusive as to the Plaintiff's remedy. In *Spencer* v. *London and Birmingham Railway Company* (1), a very similar case to the present, Vice-Chancellor *Shadwell* laid down the rule to be, that where there was a public nuisance by obstructing a highway which caused a particular private injury, a bill would lie for the private injury, and granted an injunction; and on the appeal Lord *Cottenham* did not dissent from this view.

In this case I am of opinion that there has been a wholly unjustifiable stopping up of a public or private way, it matters not which; if it is a public way the Attorney-General might have sued

(1) 8 Sim. 193; S. C. 1 Railw. Cas. 159.

in respect of the public nuisance, and the Plaintiff may also sue in respect of his individual injury; and therefore, on any view of the evidence, the Plaintiff is entitled to an injunction.

It is a very small matter, capable of compensation, but it is not the practice of the Court to order a reference as to damages under *Lord Cairns' Act* on an interlocutory application.

Solicitors for the Plaintiff: Messrs. *Thomas White & Sons.*

Solicitors for the Defendants: Messrs. *Clarke, Woodcock, & Ryland.*

V.-C. G.
1868
June 5.

EUSTACE *v.* DUBLIN TRUNK CONNECTING RAILWAY COMPANY.

Company—Scrip Certificates.

The prospectus of a railway company, issued after its incorporation, stated the capital as £255,000, in 5100 provisional scrip certificates to bearer, of £50 each, £1 to be paid on application, and £4 on allotment; and that, "on registration of the scrip, of which due notice will be given, the certificates for £50 will be divided into five shares of £10 each."

On the application of *A.*, scrip certificates were allotted to him, which he shortly afterwards, without taking any steps to convert them into shares, sold in the market. These scrip certificates, together with many others which had been in like manner parted with by their allottees, were re-purchased, on behalf of the company, by agents of the directors, and more than two years afterwards were entered upon the register as shares (each scrip certificate representing five shares) in the names of *A.* and the other allottees:—

Held, that *A.* was under no obligation to convert the scrip certificates into shares, and that, on selling them in the market, as he was entitled to do under the terms of his contract, he was relieved from all liability, and could not be retained on the register as the holder of the shares represented by these scrip certificates..

THIS was a suit for the purpose of having the name of the Plaintiff as a shareholder erased from the share register book of the Defendants, a company for making railways and tramways in and near the city of *Dublin*, under 27 & 28 Vict. c. cccxxi., with which the *Companies Clauses Act*, 1845, was incorporated.

In the spring of 1865 the *Dublin Trunk Connecting Railway Company*, by their directors, issued a prospectus headed:—

"The *Dublin Trunk Connecting Railway Company.*
"Incorporated by Act of Parliament, 27 & 28 Vict.
"Capital, £255,000.

"In 5100 provisional scrip certificates to bearer of £50 each, £1 to be paid on application, and £4 on allotment;" and stating, among other things:—"On registration of the scrip, of which due notice will be given, the certificates for £50 will be divided into five shares of £10 each."

The Act under which the company was incorporated provided

(sect. 7) that the number of shares into which the capital should be divided should be 25,000, and the amount of each share £10: no share to be issued by the company, or to vest in the person accepting the same, until not less than 20 per cent. on the nominal amount thereof should have been paid.

On the 5th of June, 1865, the Plaintiff paid a deposit of £100 to the bankers of the Defendant company, and on the same day signed the following printed application for an allotment of 100 scrip certificates:—

"Having paid to your bankers the sum of £100, I hereby request that you will allot me 100 scrip certificates of £50 each in the *Dublin Trunk Connecting Railway Company;* and I agree to accept such scrip certificates, or any less number that may be allotted to me, and to pay the further sum of £4 per certificate due upon such allotment."

In answer to his application, Plaintiff received a letter informing him that 100 scrip certificates had been allotted to him, the scrip certificates being in the following form:—

"*Dublin Trunk Connecting Railway Company.*
"Incorporated by Act 27 & 28 Vict.
"Capital £255,000.
"Scrip Certificate. £50.

"The holder of this certificate for £50 having paid a deposit of £ , is entitled on registration to have this certificate divided into five shares of £10 each in the *Dublin Trunk Connecting Railway Company,* subject to the provisions of the above Act."

The receipt given by the Plaintiff's broker for these certificates was:—

"*Dublin Trunk Connecting Railway Company.*

"Received from Messrs. *Chadwick, Adamson, McKenna, & Co.,* 100 certificates, representing 500 shares allotted to me in the above company."

In reference to this receipt, Plaintiff stated in his affidavit that he never authorized it, or anything beyond a mere acknowledgment of receipt of the certificates.

On the 3rd of July, 1865, he paid to the bankers of the company

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EUSTACE v. DUBLIN TRUNK CONNECTING RAILWAY CO.

the further sum of £400, being the amount of £4 per certificate mentioned in his application.

On the 22nd of August, 1865, Plaintiff sold and delivered forty of these scrip certificates to jobbers on the *Stock Exchange*. It appeared that these forty certificates formed part of a number of 4725, which, having been parted with by their allottees, were bought back by Messrs. *Chadwick & Adamson*, as agents for the company, at a premium, with the funds of the company. Nothing whatever was done with these certificates from the time of their re-purchase until the present year, when the company having been reconstructed, and new directors elected in the place of the former directors, who were removed for various acts of misconduct, it was determined, by counsel's advice, to amend the register by placing the 4725 certificates or shares (as they were termed by the company) in the names of the original allottees, with a view to testing the liability of such allottees.

The question raised by the present suit was, whether the Plaintiff, as the mere allottee of these forty scrip certificates to bearer, which had been transferred by him before anything had been done to convert them into shares, was liable as a shareholder in respect of them? No question arose as to the remaining sixty scrip certificates, as Plaintiff was, upon his own application, entered on the register in respect of these certificates as the holder of 300 shares, which he had afterwards, with the assent of the company, transferred to a purchaser.

Mr. *Druce*, Q.C., and Mr. *Batten*, for the Plaintiff:—

The Plaintiff is not liable to the company as a shareholder in respect of these forty scrip certificates to bearer, which passed by delivery. He was under no obligation to convert them into shares, and entered into no contract with the company which could affect him with liability as a shareholder. A scrip certificate, though it may give the right to acquire, does not impose any obligation to take shares in the company; and specific performance will not be granted of a contract to purchase the shares which scrip certificates purport to represent: *Jackson* v. *Cocker* (1). Mere payment of the deposit does not make a man a shareholder: *Waterford, Wex-*

(1) 4 Beav. 59.

ford, and Dublin Railway Company v. *Pidcock* (1); *Edwards* v. *Kilkenny Railway Company* (2). The Plaintiff had the option to continue or abandon the matter, and before taking the steps necessary to convert the certificates into shares and to clothe himself with the position of a shareholder in respect of them, he parted with them.

The repurchase of these certificates by the directors (which was an illegal transaction) gave the company no authority to enter the Plaintiff's name upon the register as a shareholder under sect. 8 of the *Companies Clauses Act*, 1845; and in any case, having regard to the period when the entry of them was made upon the register, the Plaintiff may refuse to accept them: *Ramsgate Hotel Company* v. *Montefiore* (3).

[They also cited *Taylor* v. *Hughes* (4); *Bargate* v. *Shortridge* (5); *Beckitt* v. *Bilbrough* (6).]

Mr. *Amphlett*, Q.C., and Mr. *W. H. G. Bagshawe*, for the Defendants, the company:—

By the mere allotment and acceptance of scrip certificates, which represented shares (and were acknowledged to represent them in the receipt given by the Plaintiff when they were allotted to him), the Plaintiff became liable as a shareholder, although the actual property in the shares did not vest in him until the superadded condition of registration was complied with: *East Gloucestershire Railway Company* v. *Bartholomew* (7). It is said that he merely purchased an option to convert his scrip certificates into shares. But that is not so. He was plainly under an obligation to complete the contract by accepting shares, and being bound to accept shares he was properly registered as a shareholder by the company, even though he did not authorize the insertion of his name upon the register, and had at the time sold his scrip: *Midland Great Western Railway Company* v. *Gordon* (8). Notice of the registration by the company was not necessary for perfecting the contract and making him liable as a shareholder:

(1) 8 Ex. 279.
(2) 14 C. B. (N. S.) 526.
(3) Law Rep. 1 Ex. 109.
(4) 2 J. & Lat. 24.
(5) 5 H. L. C. 297.
(6) 8 Hare, 188.
(7) Law Rep. 3 Ex. 15.
(8) 16 L. J. (Ex.) 166.

V.-C. G. 1868 EUSTACE v. DUBLIN TRUNK CONNECTING RAILWAY CO.

Bloxam's Case (1). The purchase of these scrip certificates by the former directors was unauthorized, but the right of the company to treat the Plaintiff as the holder of the shares represented by such certificates is not thereby affected, and this right has been held in a similar case not to have been lost, even after the lapse of a much longer period than has here intervened: *Barton's Case* (2); *Ex parte Morgan* (3). In *Jackson* v. *Cocker* (4) the scrip certificates were issued before the Act of Parliament incorporating the company was obtained, and it was merely held that the possession of a scrip certificate giving the holder a right, if the Act passed, to become the proprietor of a share, was not equivalent to possession of the share itself. On the other hand, a holder of scrip certificates has been held entitled as a contributory to present a Petition for a winding-up order: *In re Littlehampton Steamship Company* (5).

SIR G. M. GIFFARD, V.C.:—

The argument on the part of the company really loses sight altogether of the words "to bearer." First of all, I do not think that the receipt was at all intended to alter, nor has it altered, the nature of the contract, which depended upon the prospectus.

What, then, is the prospectus? There is to be an issue of provisional scrip certificates to bearer. The meaning of that surely is, that a person who took a certificate which might be transferred to bearer, should have something which he could safely sell in the market to bearer simply, without further liability. If that be the meaning of the contract, it is quite obvious that that object can only be effected by construing this to be a contract which does not oblige the holder to register. That is the short ground of my decision. Consistently with that meaning I do not see how you can treat the contract as having any other effect than this, viz., that the person taking the certificate should, if he chose, part with it to bearer, and should, when he parted with it, be free from all obligation. The facts are, that before any call was made the Plaintiff parted with his shares, and parted with them, according to the statement in the bill, in the market in the ordinary way,

(1) 33 Beav. 529; 10 Jur. (N. S.) 833.
(2) 4 De G. & J. 46.
(3) 1 Mac. & G. 225.
(4) 4 Beav. 59.
(5) 34 Ibid. 256; 2 D. J. & S. 521.

through the medium of jobbers, to bearer. He had not any dealing direct with the company. Whether the directors were or were not properly acting I do not think is material.

The conclusion I have come to upon the prospectus is, that it really never was intended that the persons who took these provisional scrip certificates should by taking them become shareholders, but that they should, if they chose, take certain other steps, and those other steps were, that before they could get the certificates of the shares into which the provisional scrip certificates were to be divided, they should first pay a further sum.

That really is the sum and substance of the contract. I therefore think that the Plaintiff is entitled to have his name taken from the register, and that a decree should be made to that effect. The decree will be with costs.

I may add this, that the moment you say it is a mere equitable contract, and nothing more, then the lapse of time, and the acts of the parties, shew conclusively, that neither on the one hand could the shareholder have enforced an equitable contract against the company, nor, on the other hand, could the company have enforced an equitable contract against the shareholder. I am quite satisfied that the meaning of this contract never was, that the mere holder of scrip certificates should be liable as a shareholder.

Solicitors: Mr. *J. M. Yetts;* Messrs. *Hayes, Parker, Twisden, & Co.*

M. R.
1868
June 3, 4.

WHITE *v.* LAKE.

Will—"Legacies and Bequests"—Real Estate devised in trust for Sale—Legacy Duty.

A testator gave several pecuniary and specific legacies, and directed that "all the legacies and bequests" by his will given should be paid or satisfied free of duty, and he devised his residuary real estate to *A.* for life, and afterwards upon trust for sale:—

Held, upon the ordinary meaning of the words "legacies and bequests," and also upon the general construction of the will, that the legacy duty which would become payable on the proceeds of the real estate, was not payable out of the personal estate.

STEPHEN PRESCOTT WHITE, by his will, made in January, 1866, bequeathed £5000 consols to *George Lake* and *Benjamin Lake*, upon trust to pay the dividends to his sister-in-law, *Aglae White*, widow of his brother *Charles*, during her widowhood, and after her death or second marriage upon trust to divide the stock equally between such of the eight children of his said brother as should survive him and attain twenty-one, or marry; and after making several specific and pecuniary bequests, he directed that all the "legacies and bequests" thereby by him given should be paid or satisfied free of duty, and that the succession duty payable by the devisees who should become entitled in possession on his decease in respect of his real estate thereinafter devised, should be discharged out of his personal estate, so far as the same would suffice after payment of his debts, and funeral and testamentary expenses, and satisfaction of "all legacies, legacy duty, and bequests" thereinbefore given or made, which he desired should have precedence over that direction, and in case what might be so applicable should be insufficient for the payment of the succession duty, then it should be applied rateably and proportionally to the several succession duties payable, according to the amounts thereof, and he bequeathed the residue (if any) of his personal estate to his brother *Francis*, and his sister-in-law, *Aglae White*, in equal shares; and after specifically devising certain real estates, he devised the residue of his real estate to *G. Lake* and *B. Lake*, as to certain specified parts thereof upon trust for *Francis White* for life, with

remainder in trust for his sons successively in tail, with remainder in trust for his daughters as tenants in common in tail with cross-remainders, with remainder upon trust to sell and to invest the proceeds in the funds, and to hold the funds purchased on the same trusts as the specific legacy of £5000 consols thereinbefore bequeathed; and as to other specified parts, upon similar trusts for his brother *William*, and his sons and daughters, with a similar trust, in default of such issue, for sale and investment upon the same trusts as the £5000 consols; and as to the remaining part of the residuary real estate, upon trust for *Aglae White* during her widowhood, and after her death or marriage upon trust to sell and invest the proceeds in the funds, and hold such funds on the trusts thereinbefore declared to take effect after her death or marriage concerning the £5000 consols; and he appointed *G. Lake* and *B. Lake* his executors.

The testator died in June, 1866. The object of this suit, in which the residuary legatees were the Plaintiffs, and the executors were the Defendants, was to obtain a declaration that the executors were not bound to retain any part of the testator's personal estate to provide for the duty which would become payable in respect of the proceeds of the sale of the real estate.

Mr. *Wickens*, for the Plaintiffs:—

The direction in this will that all the legacies and bequests thereby given should be paid or satisfied free of duty, does not extend to the proceeds of the real estate, which will become saleable on the death of *Aglae White*, or of that which will become saleable in the event of the failure of issue of *Francis* and *William White* respectively. The words "legacies and bequests," although they would apply to a sum of money payable out of the proceeds of the sale of real estate, *Hodges* v. *Grant* (1), are inapplicable to a devise of real estate in trust for conversion. The context of the will does not warrant such a construction of these words. The will is divided into two distinct parts, the first relating to the personal, the second to the real estate, and this direction occurs only in the first part. Again, the testator speaks of the legacies, legacy duty, and bequests "thereinbefore" given or made; and,

(1) Law Rep. 4 Eq. 140.

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lastly, he gives the direction to pay legacy duty precedence over the direction to pay the succession duty which would become payable upon his death, but if the payment of the legacy duty to become payable upon the proceeds of the real estate after the death of the tenants for life, is to take precedence of the payment of the succession duty payable by these tenants for life, the gift of the succession duty would be nugatory.

Mr. *Fry*, for the Defendants:—

The words "legacies and bequests" are wide enough to comprise a gift of the proceeds of sale of real estate. In *Hodges* v. *Grant* (1), a sum payable out of the proceeds of real estate was held to be a legacy, and there is no reason why the whole of such proceeds should not be called a legacy as well as a part. By the Legacy Duty Acts, 45 Geo. 3, c. 28, s. 4, and 8 & 9 Vict. c. 76, s. 4, every gift by will which shall be payable or satisfied out of moneys to arise by the sale of the testator's real estate, is to be deemed a legacy for the purpose of the Acts. In *Hope* v. *Taylor* (2) the word "legacy" was extended to a devise of land.

There is nothing in the context of the will to narrow the meaning of the words. The testator speaks of the legacies and bequests "hereby" given so as to include the subsequent as well as preceding gifts, and then he correctly uses the word "hereinbefore" in speaking of the legacies and the legacy duty previously given. The direction as to succession duty shews that the two parts of the will are not altogether distinct, and the difficulty suggested as to the succession duty may be got over by recouping to the estates of the tenants for life the amount of duty paid by them, if there should be enough personal estate for that purpose after payment of the legacy duties. The proceeds of the real estate being given upon the same trust as the legacy of £5000 consols, may be considered as an accretion to that legacy, and therefore strictly a legacy. [He also referred to 5 & 6 Vict. c. 82, and *Bacon's* Abridgment, tit. "Legacy."]

Mr. *Wickens*, in reply:—

The fact that the Legislature has found it necessary to declare a

(1) Law Rep. 4 Eq. 140. (2) 1 Burr. 268.

gift of the proceeds of real estate to be a legacy for the purpose of imposing duty, shews that in ordinary language the word has a more restricted meaning.

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June 4. LORD ROMILLY, M.R.:—

This is a question upon the construction of a will, and the question is, whether the legacy duty which will be payable upon the produce of the sale of real estate, which is to take place after the death of the tenant for life, is to be paid out of the general personal estate of the testator. After the estate for life there is a conversion out and out of the real estate, and consequently it is legacy duty that will be payable. I agree with the criticism of Mr. *Fry*, that when the testator says "I direct all the legacies and bequests hereby by me given to be paid or satisfied free of duty," that means "by this my will," and that the subsequent words, when he talks of "all the legacies, legacy duty, and bequests hereinbefore given or made," apply separately to each, that is, to all the legacies hereinbefore given, to the legacy duty hereinbefore given, and to the bequests hereinbefore given or made. But I am of opinion, upon the construction of this will, that the testator did not mean to class the produce of the real estate as a legacy. In the first place, I do not think that is the meaning of the word "legacy" in ordinary parlance, or that a person would say "I am going to leave legacies to my nephews" when he directs all his real estate to be sold and the produce to be divided amongst his nephews. When a person is asked what legacy he has given, the answer is expressed by a sum of money, or a particular chattel, or the like. A confirmation of that, I think, is to be found in what Mr. *Fry* read in the statutes, because the Legislature in framing the statutes directing legacy duty to be paid, felt that the produce of real estate would not be treated as legacies by any Court of justice unless it was so enacted by statute, and therefore they enacted by statute that, not for all purposes whatsoever, but that, for the particular and especial purpose of the *Legacy Duty Act*, the produce of real estate, under certain circumstances, was to be treated as a legacy, and considered as subject to legacy duty.

Upon looking at the whole of this will, I find that there are

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a great number of legacies given, and the testator directs all the legacies and bequests thereby given to be paid free of duty. Then it is an observation not without weight, that he has made two distinct divisions of his property, one of the personal property, in which he directs exactly what shall be done with it, and another of his real estate, and though the words are sufficiently large to cover any legacies, if there were any, charged on the real estate, there are none subsequently to this direction, but it is merely the produce of the real estate which is directed to be sold and to be applied according to the same trusts as the £5000 consols given in the earlier part of the will, which are, upon trust to pay the dividends to his sister-in-law, *Aglae White*, so long as she shall continue a widow, and after her death or second marriage upon trust to divide the stock equally between such of the eight children of his brother *Charles* as should survive him and attain the age of twenty-one years or marry. This cannot take place until after the death or second marriage of the widow, Mrs. *White*, and I am of opinion that this is merely a trust relating to the disposition of the produce of real estate, and that it does not properly fall within the meaning of the word "legacy." The general scope of the will leads me to the same conclusion, and I am the more confirmed since I have read over the whole will carefully, that the testator never intended the words "legacies and bequests" to apply to the produce of the real estate, and therefore I will make a declaration to that effect.

Solicitors: Messrs. *Lake, Kendall, & Lake.*

WILDAY *v.* BARNETT.

M. R.
1868
June 5.

Will—Power—Direction to pay Debts out of Personal Estate—1 Vict. c. 26, s. 27.

A testatrix, having a general power of appointment over personal property, by her will, made after the *Wills Act*, directed that her debts and funeral and testamentary expenses should be fully paid by her executor out of her personal estate; she then gave several pecuniary legacies, with a direction that they should abate rateably if, after payment of her debts and funeral and testamentary expenses, there should not be sufficient to pay them all in full, and she gave all the residue of her estate to certain persons:—

Held, that the will operated as an execution of the power in favour of the executor for the purpose of paying the testatrix's debts, funeral and testamentary expenses, and legacies, and that only so much of the property, the subject of the power, as remained after making those payments, passed by the residuary bequest.

ROBERT LINDLEY, who died in June, 1855, by his will, made in 1846, gave his residuary real and personal estate to trustees upon trust to convert, and invest, and pay the income in equal shares to his five children therein named for their lives, and upon the death of any of them without issue upon trust to pay or transfer the principal of his or her share to such person or persons as he or she should by deed or will appoint. The residue of the testator's estate amounted to £13,300, which was invested on mortgages.

Mary Lindley, one of the five children of *Robert Lindley*, died a spinster in March, 1868, having in March, 1856, made her will, by which, "In the first place, she directed that all her just debts, funeral and testamentary expenses, should be fully paid by her executor thereinafter named out of her personal estate as soon as conveniently might be after her decease;" she then gave several pecuniary legacies to the amount of £2500, but declared that "her will and meaning was, that if after payment of her just debts and funeral and testamentary expenses thereinbefore directed to be paid by her executor there should not be sufficient to pay and satisfy all the legacies in full, then the legacies should abate rateably;" she then made some specific bequests of chattels, and gave

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"all the rest and residue of my estate and effects whatsoever" to three of her nephews equally, and appointed *John Barnett* her executor.

The personal estate of *Mary Lindley*, including the share of her father's residuary estate which she had power to appoint, was sworn by her executor to be under £3000.

This was a suit by a married sister of *Mary Lindley*, to whom she had given a legacy for her separate use, for a declaration of the rights of all parties interested in her personal estate, and for a declaration that her will was a valid execution of the power given to her by her father's will, and vested one-fifth of her father's residuary estate in *John Barnett*, her executor, in his representative character, and that such share became her assets in his hands for the payment of her debts, funeral and testamentary expenses, and legacies.

Mr. *Round*, for the Plaintiff; and Mr. *Baggallay*, Q.C., and Mr. *Sandys*, for the other pecuniary legatees:—

It is clear that the testatrix has, by her will, executed her power of appointment over the fifth of her father's residuary estate, and the question is, whether she has executed it in favour only of her residuary legatees, or in such a manner as to make the appointed fund part of her general assets. We submit that even without reference to the 27th section of the *Wills Act*, and, still more, having regard to that section, the appointed property is made part of her general assets. First, as to the intention of the testatrix: the fact that, having scarcely any property of her own (except chattels which she has specifically bequeathed), she has given pecuniary legacies to an amount nearly corresponding with the amount of the fund which she had power to appoint, is a strong indication of an intention to exercise the power in favour of the pecuniary legatees: *Shelford* v. *Acland* (1); *Rooke* v. *Rooke* (2). It is admitted by the residuary legatees that the power has been exercised; if so, the appointed fund has become assets for the payment of the debts; but the direction that the legacies should abate if there should not be sufficient to satisfy them after payment of the debts, shews that the testatrix intended that whatever was avail-

(1) 23 Beav. 10. (2) 10 W. R. 435.

able for the payment of debts should also be available for the payment of legacies.

Secondly, as to the statute: *Hawthorn* v. *Shedden* (1) is a clear authority that general pecuniary legacies are "bequests of personal property described in a general manner" within the meaning of the 27th section, and therefore that when the proper assets of a testator are inadequate to pay such legacies resort must be had to the personal estate over which he has a general power of appointment; and that decision is cited with approval by Lord *St. Leonards* (2). Here the case is stronger, for the testatrix directs her debts, and by implication her legacies, to be paid out of her personal estate, which amounts to "a bequest of her personal estate" within the words of the statute.

Mr. *Yate Lee*, for the Plaintiff's husband, cited *Attorney-General* v. *Wilkinson* (3).

Mr. *Southgate*, Q.C., Mr. *Lewin*, and Mr. *Bathurst*, for the residuary legatees:—

First: Independently of the statute this will would not have executed the power. In a bequest of personal estate, where there is no reference to the power, the Court cannot take into account the state of the testator's property for the purpose of inferring an intention to execute the power, except in the case of a specific bequest of property answering the description of the property subject to the power, or in the case of the will of a married woman, who is presumed to have no power of making a will unless in exercise of a power of appointment: *Jones* v. *Tucker* (4); *Innes* v. *Sayer* (5). In *Lowe* v. *Pennington* (6), where a testatrix, having power to appoint £4000, gave pecuniary legacies greatly exceeding the amount of her own personal estate, and then bequeathed to a residuary legatee all other her personal estate and that over which she had any disposing power, it was held that the power was executed in favour of the residuary legatee, but not in favour of the pecuniary legatees. In *Shelford* v. *Acland* (7) the testa-

(1) 3 Sm. & Giff. 293.
(2) Powers, 8th Ed. p. 310.
(3) Law Rep. 2 Eq. 816.
(4) 2 Mer. 533.
(5) 3 Mac. & G. 606.
(6) 10 L. J. (Ch.) 83.
(7) 23 Beav. 10.

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trix was a married woman; in *Rooke* v. *Rooke* (1) the bequest was of stock of a specified description.

Secondly: Under the 27th section of the statute this will executes the power in favour of the residuary legatees. The only general bequest of personal estate contained in the will is the bequest of the residue of her estate and effects. The only other bequests are the pecuniary legacies and the specific bequests of chattels. The mere appointment of an executor is not equivalent to a general bequest, nor is the direction for payment of debts out of the testatrix's personal estate; indeed that direction is, if anything, an expression of a contrary intention within the meaning of the 27th section of the statute. It is true that in *Hawthorn* v. *Shedden* (2) the mere gift of a pecuniary legacy was held to be an execution of a power so far as the testator's own assets were insufficient, but it is submitted that that decision cannot be supported. By "property described in a general manner," the statute refers not to a pecuniary legacy, which is not a description of property at all, but to gifts of a general description of property, such as money or securities for money, as in *Turner* v. *Turner* (3). The statute was intended merely to supply the omission of a formal reference to the power; but according to *Hawthorn* v. *Shedden* the Court must import into the construction of the statute the consideration of the state of the testator's property; the result would be that the power might be wholly or partially exercised according to the state of the testator's property at his death, which is contrary to the settled doctrine, that where an appointment is made by will for purposes which do not exhaust the fund, the surplus is not unappointed, but falls into the residue of the testator's estate: *Lefevre* v. *Freeland* (4). *Hawthorn* v. *Shedden* was virtually overruled by *Hurlstone* v. *Ashton* (5). But even if it is a binding authority, it is distinguishable from this case by the absence of a residuary bequest. Here the residuary bequest is, by force of the statute, exactly equivalent to the residuary bequest in *Lowe* v. *Pennington* (6), which is, therefore, a conclusive authority upon this case.

(1) 10 W. R. 435.
(2) 3 Sm. & Giff. 293.
(3) 21 L. J. (Ch.) 843.
(4) 24 Beav. 403.
(5) 11 Jur. (N. S.) 725.
(6) 10 L. J. (Ch.) 83.

But if the power is executed in favour of the pecuniary legatees, the residuary bequest must be construed as an appointment of £160, the difference between the amount of the fund subject to the power and the amount of the legacies: *In re Harries' Trust* (1); and consequently, if any part of the fund is required for the payment of debts, the pecuniary legacies and the residuary bequest must abate rateably, according to the principle of *Page* v. *Leapingwell* (2).

Mr. *Rotch*, for the executor.

LORD ROMILLY, M.R.:—

I have no doubt, upon the construction of this will, that the statute applies, and that the will operates as an execution of the power, and that there is a good appointment to the executor. I assent to Mr. *Bathurst's* argument, that the will must, if it operates as an execution of the power at all, operate as an appointment of the whole fund. But what I go upon in this case is the first clause in the will, by which the testatrix directs that all her just debts, funeral and testamentary expenses, shall be paid by her executor out of her personal estate. Now if the will had stopped there, and the testatrix had not left enough property of her own to pay the debts, could it have been contended that the direction which I have referred to did not operate as an execution of the power for the purpose of making the property, the subject of the power, assets for the payment of the debts? In *Hurlstone* v. *Ashton* (3) there was no such direction, and not even a direct appointment of executors; the only mention of executors in that case being in the form of a pecuniary legacy to certain persons as executors. Here there is an express appointment of an executor, and a direction that he shall pay the debts, funeral and testamentary expenses, out of the testatrix's personal estate. But the will does not stop there; the testatrix goes on to give pecuniary legacies, and she impliedly directs that they shall be paid out of the same fund as the debts and funeral and testamentary expenses, for she says that if after payment of her debts and expenses thereinbefore directed to be paid

(1) Joh. 199. (2) 18 Ves. 463.
(3) 11 Jur. (N.S.) 725.

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by her executor, there shall not be sufficient to pay all the legacies, they shall abate rateably; she had already appointed the property to her executor for the purpose of paying the debts and expenses, and it is the duty of the executor to pay the legacies out of the fund so appointed to and vested in him; that being so, I think that the gift of all the rest and residue of her estate is not an execution of the power in favour of the residuary legatee, but a gift of so much of the fund previously appointed to the executor as should remain after payment of the debts, expenses, and legacies. That construction of the will gets rid of the argument of Mr. *Lewin* derived from the case of *Page* v. *Leapingwell* (1) and other cases of that class. In this view of the case it is unnecessary to consider the question, whether the residuary bequest, if it operated as an execution of the power, so operated only for the benefit of the residuary legatees or for the general purposes of the will. I will, therefore, make a declaration in the terms of the prayer of the bill.

Solicitors: Mr. *Webster*; Messrs. *Sandys & Knott*.

M. R. 1868 *June* 3.

HEWITT *v.* KAYE.

Donatio Mortis Causâ—Cheque not presented in Donor's Lifetime.

The delivery of the donor's cheque on his banker, which was not presented before the donor's death:—

Held, not a good *donatio mortis causâ*.

Post 277
18 Eq 490
8 Ch 894
18 Eq 678
Ch D 732

THIS was a special case.

Elizabeth Harrison in 1860 founded a charity called *St. Scholastica's Retreat*, and in 1861 she founded a charity called *St. John's Hospice*. By her will, made in September, 1866, she gave all her residuary pure personalty to the trustees of *St. Scholastica's Retreat*. On the 15th of October, being on her death-bed and in contemplation of her death, she expressed a desire to alter the deed of settlement of *St. John's Hospice*, and to vest £600 in the trustees of *St. John's Hospice* upon the trusts of the deed as amended, and accordingly she instructed her solicitor to prepare a deed altering the settlement, and a codicil giving the £600, but

(1) 18 Ves. 463.

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she died before either of these documents could be prepared. In the meantime, believing that she would not have time to execute the deed and codicil, she signed and gave to one of the trustees of *St. John's Hospice* a cheque on her bankers for £600, but she died before it was possible to present the cheque.

The question in the special case, in which the trustees of *St. John's Hospice* were the Plaintiffs, and the executors and the trustees of *St. Scholastica's Retreat* were the Defendants, was, whether the trustees of *St. John's Hospice* were entitled to receive the sum of £600, the amount of the cheque, out of the testatrix's assets by way of *donatio mortis causâ*, or otherwise.

Mr. *Bagshawe*, for the Plaintiffs:—

The gift of the cheque was a good *donatio mortis causâ* of the £600. The gift was made with a view to the donor's death, and on condition of her death by her then illness, and there was a sufficient delivery. It is not necessary that the complete property in the thing given should pass by the delivery, but that the property should so far pass as to give the donee a title to the assistance of a Court of Equity to make the donation complete. Thus the delivery of a bond, a promissory note, a mortgage deed, or a policy of assurance, is a good *donatio mortis causâ*, because the donor has done all that he can do to pass the property; and although the possession of the instrument does not enable the donee to recover the *chose in action*, the Court compels the executor to allow his name to be used for the purpose of giving effect to the gift. In *Lawson* v. *Lawson* (1), where a husband on his death-bed drew a bill upon a goldsmith, which is the same thing as a cheque on a banker, to pay £100 to his wife to buy her mourning, it was held a good gift; in *Tate* v. *Hilbert* (2) the cheque was given without reference to the donor's death; in *Bouts* v. *Ellis* (3) the gift of a cheque, which was afterwards by the donor's direction exchanged for the cheque of a stranger, was held valid, although the stranger's cheque was not paid till after the donor's death; in *Witt* v. *Amis* (4) and *Amis* v. *Witt* (5) the delivery of a bankers' deposit note was

(1) 1 P. Wms. 441.
(2) 2 Ves. 111.
(3) 17 Beav. 121; 4 D. M. & G. 249.
(4) 1 B. & S. 109.
(5) 33 Beav. 619.

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held a good gift *mortis causâ* of the money deposited. Here the testatrix, by giving the cheque, has done all in her power to complete the gift. [He also cited *Drury* v. *Smith* (1).]

Mr. *Speed*, for the Defendants, was not called upon.

LORD ROMILLY, M.R.:—

I am of opinion, both upon principle and upon authority, that this is not a valid *donatio mortis causâ*. When a man on his death-bed gives to another an instrument, such as a bond, or promissory note, or an I O U, he gives a *chose in action*, and the delivery of the instrument confers upon the donee all the rights to the *chose in action* arising out of the instrument. That is the principle upon which *Amis* v. *Witt* (2) was decided, where the donor gave the donee a document, by which the bankers acknowledged that they held so much money belonging to the donor at his disposal, and it was held that the delivery of that document conferred upon the donee the right to receive the money. But a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. The testatrix gave this cheque at night, and she died in the course of the same night before it could be presented; suppose she had said, "I have got £600 in my desk; bring it to me, and I will give you the money," and had died before it was brought to her, that would have been no gift; and the gift of a cheque is the same thing; it is worth nothing until acted upon, and the authority to act upon it is withdrawn by the donor's death. All the authorities decide that there must be complete delivery; the only case at all tending the other way is *Lawson* v. *Lawson* (3), but that has been explained by Lord *Loughborough* on the principle that the drawing of the bill was in the nature of an appointment. The question must be answered in the negative.

Solicitor for the Plaintiffs: Mr. *G. M. Arnold, Gravesend.*
Solicitor for the Defendants: Mr. *Sismey.*

(1) 1 P. Wms. 404. (2) 33 Beav. 619. (3) 1 P. Wms. 441.

BELL *v.* BLYTH.

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Ship—Mortgage—Priority—Registration—Entry of Discharge—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 68.

In 1862 the owner of a ship mortgaged it to *G.*, who transferred the mortgage by way of sub-mortgage to *P.*, and the mortgage and transfer were registered. In October, 1863, *G.* paid off *P.'s* sub-mortgage, and the original mortgage was entered in the register as discharged, but the mortgage deed was returned to *G.*, who shortly afterwards deposited it with *W.* by way of sub-mortgage. In October, 1864, *P.* executed a re-transfer of the mortgage to *G.*, and *G.* executed a transfer to *W.*, and both these transfers were registered, the registrar at the same time entering a note that the entry of discharge was erroneous. In March, 1865, *G.* paid off *W.'s* sub-mortgage, but the mortgage was not re-transferred. In May, 1865, the mortgagor gave *G.* another mortgage of the ship to secure an amount which included the money due on the original mortgage, and this mortgage was registered. In October, 1865, the second mortgage was transferred to *B.*; in March, 1866, *G.* agreed that *W.*, who had no notice of the transfer to *B.*, should hold the original mortgage to secure an account current between them, and in July, 1866, *B.* registered his transfer:—

Held, that as *W.* became, in March, 1865, a trustee of the original mortgage (if it was a subsisting mortgage) for *G.*, and as the money secured by it was included in the subsequent mortgage which was transferred to *B.* before the new agreement with *W.*, *B.* had priority over *W.*

Semble, that under the 68th section of the *Merchant Shipping Act*, 1854, the entry of discharge destroyed the original mortgage as against subsequently registered mortgages, and that all the subsequent entries relating to it were void.

Aff'd by H. of L. 4 Ch. 136

ON the 23rd of April, 1862, *M. J. Routh*, the registered owner of the British ship, *Providence*, mortgaged the ship to *Charles Grierson* and *John Edmund Cole* for £1200, and on the same day the mortgage was transferred by *Grierson & Cole* to *Philip Blyth*; the mortgage and the transfer were registered on the 25th of April, the mortgage being designated by the letter *G.*

On the 21st of October, 1863, *Grierson & Cole* paid to *Blyth*, through his father, £1200, and thereupon *Blyth's* father, acting under a power of attorney from him, signed a receipt endorsed on the mortgage in these words, "Received the sum of £1200 in discharge of the within-written security." On the 23rd of October the mortgage with the receipt endorsed was produced by *Blyth's* father to the registrar, who thereupon entered the discharge of the original

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mortgage. *Cole* and *Routh* in their affidavits in this suit, stated that *Grierson & Cole* in October, 1863, satisfied the mortgage on *Routh's* behalf, but *Routh*, on cross-examination, stated that he did not recollect requesting *Grierson & Cole* to pay it off, that he did not give them any special funds for the purpose, and that if the balance on the current account between him and them was in his favour the mortgage would be satisfied, but not otherwise, and in the account between *Routh* and *Grierson & Cole* there was no entry of the payment to *Blyth*, and the accounts shewed that in October, 1863, there was a considerable balance against *Routh*, including the £1200 originally advanced to him on the security of the mortgage. *Blyth* returned the mortgage deed to *Grierson & Cole*—and in October, 1864, on the occasion of the re-transfer mentioned below, he, at the request of *Cole*, applied to the registrar to amend the entry of discharge, on the ground that the receipt was only intended as an acknowledgment that he had been repaid by *Grierson & Cole*. The registrar refused to alter the entry, but entered in the column of "Remarks," opposite the entry of discharge, and signed with his initials, the following note, "Deed reproduced. Receipt signed in error when re-transfer intended by *Philip Blyth*."

In November, 1863, the firm of *Webb, Blyth, & Co.* accepted bills for £1250 for *Grierson & Cole*, as a security for which *Grierson & Cole* agreed to deliver to them the mortgage *G.* and to transfer it to them at their request. In January, 1864, the mortgage deed was delivered to *Webb, Blyth, & Co. Webb* stated that on that occasion, having some apprehension lest the receipt endorsed should have cancelled the mortgage, he pointed out the receipt to *Cole*, who told him that the receipt did not discharge the mortgage, and that the mortgage belonged to *Grierson & Cole. Cole's* account of the transaction was that it was agreed between his firm and *Webb, Blyth, & Co.* that the mortgage should be revived as a security for the money due from his firm to *Webb, Blyth, & Co.*

In June, 1864, *Philip Blyth* joined the firm of *Webb, Blyth, & Co.*, which thenceforward was styled *Blyth, Webb, & Co.* On the 20th of October, 1864, *Blyth* executed a re-transfer of the mortgage to *Grierson & Cole*, and on the 22nd of October, 1864, this re-transfer was registered. On the 25th of October, 1864, *Grierson & Cole*

executed a transfer of the mortgage to *Webb*, and on the 3rd of November, 1864, this transfer was registered. In March, 1865, the £1250, to secure which the mortgage had been deposited, was repaid by *Grierson & Cole* to *Blyth, Webb, & Co.*, but no re-transfer was executed; the mortgage deed was left in the possession of *Blyth, Webb, & Co.*, and no entry was made on the register. On the 19th of May, 1865, *Routh* executed another mortgage of the ship to *Grierson & Cole*, to secure the sum of £2500 then due to them from him, and all other sums which might become due to them on an account current between them and him; this mortgage contained a covenant that the ship was free from incumbrances "save as appears by the registry of the said ship." It was registered on the 20th of May, 1865, and designated by the letter *J.* The £2500 included the £1200 due on mortgage *G.*, but on the entry in the register of mortgage *J.*, mortgage *G.* was mentioned as a subsisting mortgage for £1200 in favour of *Webb*.

On the 17th of November, 1865, mortgage *J.* was transferred by *Grierson & Cole* to the Plaintiff, *Charles Bell*. In the meantime the mortgage deed *G.* remained in the hands of *Blyth, Webb, & Co.*, though there was nothing due to them on the security of it, but on the 28th of March, 1866, it was verbally agreed between *Grierson & Cole* and *Blyth, Webb, & Co.*, that this deed should become a security in the hands of *Blyth, Webb, & Co.*, for the general balance that might be due to them from *Grierson & Cole*. On the 12th of July, 1866, the transfer of the mortgage *J.* to the Plaintiff was registered. In the same month *Grierson & Cole* became insolvent. In October, 1866, both *Bell* and *Blyth, Webb, & Co.*, took possession of the ship, each of them claiming to be first mortgagee; but by arrangement the freight was collected and retained by a firm of ship-brokers on behalf of both parties.

In January, 1867, *Bell* instituted this suit against *Blyth, Webb, & Co.*, *Routh*, and the brokers, seeking for a declaration that he was entitled to the first charge on the ship, for an account of what was due on his security, for the sale of the ship, and for the payment to him of the proceeds of the sale, and of the freight moneys, and for an injunction restraining *Blyth, Webb, & Co.* from selling the ship.

The ship was subsequently sold by arrangement under an order of the Court, and the proceeds (£950) were paid into Court.

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Mr. *Jessel*, Q.C., and Mr. *Kekewich*, for the Plaintiff:—

The mortgage *G.*, under which the Defendants, *Blyth, Webb, & Co.* claim, was in fact discharged in October, 1863. *Cole* states that he and his partner then paid it off on behalf of *Routh*, the mortgagor, though they afterwards attempted to revive it for the purpose of making a sub-mortgage to *Webb, Blyth, & Co.* But whether *Grierson & Cole* intended to discharge the mortgage or to revest it in themselves, the entry of discharge on the register had the effect, under the 68th section of the *Merchant Shipping Act*, 1854 (17 & 18 Vict. c. 104), of vesting the mortgagee's interest in the person in whom it would have vested if the mortgage had never been made, that is to say, in the mortgagor; and after that entry the mortgage cannot be set up against any registered mortgage of the ship. The memorandum that the entry of discharge was erroneous, and the subsequent entries of the transfers in October, 1864, cannot restore a mortgage which has once been legally discharged. After October, 1863, all the interest (if any) that *Grierson & Cole* had, and all that they could give to *Webb, Blyth, & Co.*, was an equitable lien on the ship; but in March, 1865, the debt, to secure which this equitable lien had been transferred to *Webb, Blyth, & Co.*, was satisfied, and the equitable interest thereupon revested in *Grierson & Cole*, and in May, 1865, *Routh* gave them a legal registered mortgage to secure £2500, which included the money for which they had the equitable lien, and thereupon the equitable lien merged in the legal mortgage; that mortgage was transferred to the Plaintiff before the transaction in March, 1866, by which *Grierson & Cole* again attempted to revive the extinct mortgage *G.* in favour of *Blyth, Webb, & Co.* The Plaintiff therefore is the owner of the only registered legal mortgage, and the only right of the Defendants is an equitable right by virtue of an agreement subsequent to the Plaintiff's purchase of the legal mortgage.

Mr. *Baggallay*, Q.C., and Mr. *W. F. Robinson*, for *Blyth, Webb, & Co.*:—

We submit that mortgage *G.* is a valid subsisting mortgage, and that it is the first mortgage on the register, and therefore entitled to priority. It is clear that *Grierson & Cole* did not in October, 1863, intend to discharge the mortgage as between themselves and

Routh. They had received no funds from *Routh* for that purpose, nor had he asked them to pay it off. There was a large balance due from him to them at the time, and almost immediately after they had paid off *Blyth* they agreed to deposit the mortgage with *Webb, Blyth, & Co.*, and they have ever since treated it as a subsisting mortgage. The 68th section of the Act only applies "when a registered mortgage has been discharged;" and if, as in this case, the mortgage was not, in fact, discharged, but only redeemed from a sub-mortgagee, the erroneous entry does not, as between the mortgagor and the original mortgagee, discharge the mortgage, though possibly a second mortgagee registering his mortgage while the erroneous entry remained uncorrected and without notice of the error, might obtain priority. But in this case, before any other dealings with the ship took place, the entry of discharge was corrected, and a formal re-transfer of the mortgage to *Grierson & Cole*, and a transfer by them to *Webb*, were executed and registered. There is nothing upon the face of the mortgage *J.*, under which the Plaintiff claims, to shew that the £2500, for which it was given, includes the £1200 secured by mortgage *G.*, and it contains a covenant against incumbrances, "save as appears by the registry of the ship." Now, at the date of that mortgage, and at the date of the transfer of it to the Plaintiff, the registry of the ship shewed that mortgage *G.* was an existing mortgage vested in *Webb*, and it is so entered in the column of existing mortgages opposite the entry of mortgage *J.* It is true that the particular debt, to secure which mortgage *G.* had been vested in *Webb*, had been discharged by *Grierson & Cole* in March, 1865, but *Webb* retained the legal mortgage. The Plaintiff, having notice by the terms of mortgage *J.*, and, by the register, of the existence of mortgage *G.*, vested in *Webb*, made no inquiries, and neglected to register his transfer until after *Blyth, Webb, & Co.* had, without notice that any other person than *Grierson & Cole* had any charge on the ship, agreed with *Grierson & Cole* that mortgage *G.* should be held by *Webb* as a security for other debts due to *Blyth, Webb, & Co.* from *Grierson & Cole*. The Defendants therefore, both as holders of the first registered mortgage, and as having taken their present security without notice of the Plaintiff's interest, through his neglect to register, are entitled to priority.

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Mr. *Hadley*, for *Routh*, contended that the costs of a dispute as to priority occasioned by the mortgagees ought not to be a charge on the ship.

Mr. *Hull*, for the brokers who had received the freight, asked for their costs.

Mr. *Kekewich*, in reply:—

The entry of discharge on the register is conclusive, just as the certificate of registration of a company under the *Companies Act*, 1862, is conclusive evidence that the Act has been complied with: *Peel's Case* (1). When mortgage *G.* was deposited with *Webb, Blyth, & Co.* they had notice that it had been entered as discharged, but they did not inquire of *Routh* whether it was, in fact, discharged.

May 26. LORD ROMILLY, M.R.:—

This suit is instituted to enforce a charge on the ship *Providence*. The Defendants claim to have a prior charge on the ship. The question depends on a complicated series of transactions relating to this ship, all of which appear on the register, and are made quite distinct by the affidavits of the parties. There is, in fact, no dispute about the facts, and when the facts are clearly stated the propositions of law that flow from them are, in my opinion, free from ambiguity. [His Lordship stated the facts, and continued:—] The question is, who in this state of circumstances is entitled to the proceeds of the ship and freight? I am of opinion, on a full review of the circumstances, that the Plaintiff is entitled to priority both on the merits and also on the technical effect of the register.

I proceed, in the first instance, to consider it on the merits, and for this purpose I assume the mortgage *G.* for £1200 to *Grierson & Cole* not to have been destroyed by the receipt for the money, and the entry on the register of the 23rd of October, 1863. The mortgage was then, on the 2nd of November, 1863, pledged to *Webb, Blyth, & Co.* as a security against bills accepted by them for

(1) Law Rep. 2 Ch. 674.

the accommodation of *Grierson & Cole*, but it was a security for nothing more. These bills were all met after renewal by *Grierson & Cole*, and the last of them was paid in March, 1865. It is true that after this the mortgage instrument remained in the custody of *Blyth, Webb, & Co.*, but it was the property of *Grierson & Cole*, who might have required and obtained possession of it at any time, and *Blyth, Webb, & Co.* could only hold it as the agents of *Grierson & Cole*.

It was not till March, 1866, that the deed was deposited afresh by *Grierson & Cole* with *Blyth, Webb, & Co.*, or, what is the same thing, they were allowed to retain it to secure the balance of the account current between the two firms. But at the time when this was done the debt originally secured by this mortgage had been included in the mortgage of £2500, which was made on the 19th, and registered on the 20th of May, 1865, and was assigned to Plaintiff in November, 1865, and during this time, as nothing was due to *Blyth, Webb, & Co.* on the security of the mortgage for £1200, they held the deeds either as agents for *Grierson & Cole*, or as trustees for all persons claiming through or under *Grierson & Cole*. It is true that the transfer of this mortgage to the Plaintiff was not registered until the 12th of July, 1866, and this was after the transaction of March, 1866; but, in truth, the transaction of March, 1866, was a new security given by *Grierson & Cole* to *Blyth, Webb, & Co.*, and if it is to derive any advantage from the register, it ought to have been registered afresh as a fresh security, but as such it was never registered at all. In short, in March, 1865, *Blyth, Webb, & Co.* were paid off, and the mortgage, if then subsisting, was the property of *Grierson & Cole*, and was, together with other sums, transferred to the Plaintiff and vested in him in November, 1865, and the subsequent dealings with *Blyth, Webb, & Co.* cannot supersede the prior charge which the Plaintiff had acquired on the ship. On the merits, therefore, it appears to me that the Plaintiff has the prior charge both in point of date and of *bonâ fide* advance.

The Defendants put forward a technical argument in their favour. They say that on the register it appears that the mortgage for £1200 was a subsisting charge on the ship transferred to *Webb*, and that this remained to the end represented as a subsisting charge in

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favour of *Webb*, and consequently that the Plaintiff could only take subject to that charge. The answer to this is, that the register itself shewed that the mortgage had been discharged by payment of the amount due on it on the 21st of October, 1863. It is true that the registrar signed the note I have read after the lapse of a year; but it is difficult to understand how, after the lapse of a year, the parties to a deed could restore and renew a mortgage which had, by the provisions of the statute, been discharged and put an end to twelve months previously.

The Defendants, therefore, are in this dilemma; either the register is conclusive or it is not; if it is, the mortgage *G.* was discharged and could not be restored, if it is not, then the Plaintiff is the prior incumbrancer, and entitled to rank before the Defendants.

The balance of my opinion is, that all the entries in the register respecting this mortgage *G.*, subsequent to the entry on the 23rd of October, 1863, are void, and relate to a supposed charge which had no existence, and which the Plaintiff and those looking at the register were entitled to disregard. If parties could thus recall and vary former entries in the register as against other parties, it is obvious that room would be afforded for frauds of every description. It is not necessary to consider whether the transaction of the 2nd of November, 1863, between *Grierson & Cole*, and *Webb, Blyth, & Co.*, could have been maintained against the subsequent incumbrance of the Plaintiff, because all that was due in respect of that transaction was discharged in March, 1865, but I am of opinion that no transaction subsequent to the 20th of May, 1865, when the fresh mortgage was given to *Grierson & Cole*, including the £1,200 in the account, could be sustained against a *bonâ fide* purchaser from *Grierson & Cole*, and that consequently the claim of the Defendants fails, and that the Plaintiff is entitled under the mortgage of the 19th of May, 1865, and the transfer thereof of the 17th of November, 1865, to the first charge on the proceeds of the sale of the ship, for the principal and interest secured by that mortgage.

Mr. *Jessel* asked that the Defendants *Blyth, Webb, & Co.* might be ordered to pay the Plaintiff's costs, as the suit had been occasioned

by their disputing his priority. He referred to *Newton* v. *Newton* (1).

Mr. *Baggallay* submitted that the Defendants should pay only so much of the costs as had been occasioned by their contention.

Mr. *Hadley* referred to *Hiorns* v. *Holtom* (2).

May 27. LORD ROMILLY, M.R.:—

The Defendants, *Blyth, Webb, & Co.*, must pay to the Plaintiff the costs of the suit so far as they have been occasioned by their contesting the Plaintiff's priority, including the costs of the brokers; the Plaintiff must add the rest of his costs to his security. I think that the mortgagor would be entitled to say that the costs of *Blyth, Webb, & Co.* should not be charged against him or his ship, because their charge was created by *Grierson & Cole*, but as the proceeds of the ship will not be sufficient to pay the Plaintiff in full, it is not necessary to make any direction on this point in the decree. I have nothing to do with any question between *Grierson & Cole*, who are not parties to the suit, and *Blyth, Webb, & Co.*, and still less with any question between the mortgagor and *Grierson & Cole*, but it is clear that the mortgagor is not bound to pay extra expenses occasioned by the sub-mortgage of *Grierson & Cole*, and the deposit with *Blyth, Webb, & Co.*

Solicitors for the Plaintiff: Messrs. *W. & H. P. Sharp.*

Solicitors for the Defendants: Messrs. *Cotterill & Sons;* Messrs. *McKenzie & Co.*

(1) Law Rep. 6 Eq. 135. (2) 16 Jur. 1077.

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DERING *v.* KYNASTON.

Settlement—Covenant to settle Wife's other and future Property—Defeasible Interest—Estate Tail in Remainder after other Estates Tail—Fines and Recoveries Act.

A covenant in a marriage settlement by husband and wife to settle all the estate, property, and effects whatever which they or either of them in the right of the wife were or was at the date of the settlement, or should during the coverture become, seised or possessed of or entitled to at law or in equity, for all the estate and interest of them or either of them upon the trusts of the settlement:—

Held, only to include indefeasibly vested interests, and therefore not to include the wife's interest in real estate which, at the date of the settlement, stood limited to *A.*, the wife's father, for life, with remainder to his sons successively in tail male, with remainder to *B.* for life, with remainder to his sons successively in tail male, with remainder to the daughters of *A.* as tenants in common in tail, *A.*, *B.*, and two sons of *A.* having been alive at the date of the settlement, the two sons having died bachelors during the coverture, and *A.* and *B.* having survived the husband, and died without issue in the wife's lifetime:

Whether under the covenant the wife could have been compelled to execute a disentailing deed, if during the coverture she had acquired an indefeasibly vested estate tail—*quære*.

THIS was a special case.

William Yea, who died in 1804, by his will, devised a freehold estate at *Taunton Dean* to his wife (who died in 1829) for life, with remainder to his son *W. W. Yea* for life, with remainder to the first and other sons of *W. W. Yea* successively in tail male, with remainder to his son *H. L. Yea* for life, with remainder to the first and other sons of *H. L. Yea* successively in tail male, with remainder to the daughters of *W. W. Yea* as tenants in common in tail, with cross remainders in tail between them, with remainders over.

W. W. Yea had two sons, *Lacy* and *Raleigh*, and three daughters.

In 1846 *Charlotte Yea*, one of the daughters of *W. W. Yea*, was married to *Cholmeley Dering*, and by the settlement made upon their marriage, which recited that it had been agreed that certain moneys, stocks, and funds then belonging to Miss *Yea*, and therein particularly mentioned, "and all other the property of every kind" (above £100) "of, in, or to which she, or Mr. *Dering* in her right,

then was, or should thereafter during the intended coverture, by any means whatsoever, be or become possessed, interested, or entitled, should be assigned and settled" in manner thereinafter mentioned, certain property of Miss *Yea* (not including her interest in the *Taunton Dean* estate) was settled upon trust during the coverture out of the income to pay £100 a year to her separate use, and pay the residue of the income to Mr. *Dering*, and after the death of either of them to pay the income to the survivor for life, and after the death of the survivor upon the usual trusts for the children of the marriage; and Mr. *Dering* and Miss *Yea* covenanted with the trustees that "all the estate, property, and effects whatsoever, both real and personal, exceeding in amount or value the sum of £100 at any one time, which they or either of them in her right were or was then, or should at any one time or from time to time during the coverture, become seised or possessed of or entitled to at law or in equity, under any gift, devise, or bequest in her favour, or by descent, representation, or any other means whatsoever, should be assured and settled, and that they respectively would do and execute, and concur in doing and executing, such acts and deeds whatsoever as by the trustees or their counsel should be reasonably advised for assuring and settling the same and every part thereof for all the estate and interest of them or either of them," upon the trusts thereinbefore declared concerning the property thereinbefore assured and settled by Miss *Yea*, but not so as to increase the said annual sum of £100; and that until the said estate, property, and effects should be so settled and assured, the same should be subject to such trusts as aforesaid, and should be enjoyed accordingly.

At the date of the settlement *W. W. Yea*, his two sons, and *H. L. Yea* were living, and the three last were bachelors. The two sons, *Lacy* and *Raleigh*, both died in, 1855, bachelors, without having barred the entail of the *Taunton Dean* estate. Mr. *Dering* died in 1858, *W. W. Yea* died in 1862 without having had any other child, and *H. L. Yea* died in 1864 a bachelor. After his death Mrs. *Dering* and her sisters barred the entail of the *Taunton Dean* estate, and conveyed it, as to an undivided third, to the use of Mrs. *Dering* in fee. There were only two children of Mr. and Mrs. *Dering*, both of them still infants.

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The question asked by the special case, in which Mrs. *Dering* was Plaintiff, and the trustees of the settlement and the two children were Defendants, was, "whether the Plaintiff is now seised of or entitled to the fee simple and inheritance of and in one-third of the *Taunton Dean* estate, or is entitled to any other, and what estate or interest therein."

Mr. *Southgate*, Q.C., and Mr. *Eddis*, for the Plaintiff:—

First: The Plaintiff's interest in the *Taunton Dean* estate was not included in the covenant. The object of the covenant was to protect the property of the Plaintiff from the marital rights of her husband; but at the date of the settlement, and during the whole time of the coverture, the Plaintiff had nothing but an estate tail in remainder, which up to the year 1855 might have been barred by either of her brothers with the consent of her father, and during the whole of the coverture might have been defeated by the birth of a son either of her father or of *H. L. Yea*. If it had been intended to settle the interest which she had in this estate at the date of the settlement, it would have been specifically included in the settlement, and not left to the operation of a general covenant, and there was no change of interest during the coverture which would bring it within the words of futurity in the covenant, as in *Maclurcan* v. *Lane* (1) and *Archer* v. *Kelly* (2). In *Atcherley* v. *Du Moulin* (3) Vice-Chancellor *Wood* held that a somewhat similar covenant did not comprehend a contingent interest, and doubted whether it would comprehend a reversionary interest.

Secondly: The Plaintiff could not under the covenant have been compelled to execute a disentailing deed of her share of the property. The *Fines and Recoveries Abolition Act*, sect. 47, prevents the operation in equity of any disposition by a tenant in tail not made according to the Act; and though the Court would enforce specific performance of an express agreement to execute a disentailing deed, it will not, under a general covenant to settle property, or a covenant for further assurance, not expressly referring to a disentailing deed, compel the covenantor to defeat the estate of his issue and those in remainder: *Davis* v. *Tollemache* (4);

(1) 5 Jur. (N. S.) 56.
(2) 1 Dr. & Sm. 300.
(3) 2 K. & J. 186.
(4) 2 Jur. (N. S.) 1181.

6 Jur N.S. 814

so such a covenant does not bind the covenantor to exercise a general power of appointment: *Ewart* v. *Ewart* (1). Therefore the only interest which the covenant could affect would be the Plaintiff's interest during her own life, and it is well settled that a life interest is not within a covenant of this kind: *Duncan* v. *Cannan* (2); *St. Aubyn* v. *Humphreys* (3); *White* v. *Briggs* (4); *Townshend* v. *Harrowby* (5).

Mr. *Baggallay*, Q.C., and Mr. *Gardiner*, for the Defendants:—

First: From the language of the covenant and of the recital it is clear that it was intended that all the Plaintiff's property of every kind, then present or to be acquired during the coverture, should be settled. She had at the date of the settlement, not as in *Atcherley* v. *Du Moulin* (6) a contingent interest, but a vested remainder in a share of the *Taunton Dean* estate, and it has been decided that reversionary interests which do not fall into possession during the coverture are included in such covenants: *Butcher* v. *Butcher* (7); *Hughes* v. *Young* (8). This interest, being somewhat remote, may have been overlooked, or it may not have been thought worth while then to execute a disentailing deed, but it is clearly within the words of the covenant.

Secondly: The Plaintiff and her husband could at any time after the execution of the settlement have been required to bar her estate tail and settle the base fee upon the trusts of the settlement. The covenant extends to "all her estate and interest," and the estate and interest of a tenant in tail includes the right of barring the entail, which is an element of the estate, and has no analogy to a power of appointment; the covenant binds the Plaintiff and her husband to do and execute such acts and deeds as should be required by the trustees for settling the property upon the trusts of the settlement, and such a settlement could only be effected by a disentailing deed. These covenants are executory, and the Court will direct them to be performed in such a manner as to give effect to the objects of the settlement: *Master* v. *De Croismar* (9). The

(1) 11 Hare, 276. 17 Jun 1022
(2) 21 Beav. 307.
(3) 22 Ibid. 175.
(4) Ibid. 176, n.
(5) 4 Jur. (N. S.) 353.
(6) 2 K. & J. 186.
(7) 14 Beav. 222.
(8) 32 L. J. (Ch.) 487.
(9) 11 Beav. 184.

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47th section of the *Fines and Recoveries Act* prevents the operation in equity of an informal disposition by a tenant in tail, but does not relieve the tenant in tail himself from the obligation to perform his own agreements. If the Plaintiff had been entitled to a leasehold interest renewable at her request, the Court would have compelled her under the covenant to make the necessary request.

The facts of the estate having fallen into the possession of the Plaintiff and of her having barred the estate, being subsequent to the coverture, do not affect the question.

Mr. *Southgate*, in reply.

May 6. LORD ROMILLY, M.R.:—

At the date of the settlement the interest of Mrs. *Dering* in the *Taunton Dean* estate was in substance a mere contingency, and such it continued to be during the whole time of the coverture. At the date of the settlement her two brothers were living, both or either of whom, with the consent of their father, might have destroyed her interest, and up to the time of her husband's death her father and uncle were living, both or either of whom might have had sons who would have taken estates in tail male prior to her estate. I am of opinion that such an interest was not intended to be included in the covenant, but that the covenant only includes vested interests, not necessarily vested in possession, but so vested as to be incapable of being divested. There is no authority for including a contingent interest in such a covenant, and *Atcherley* v. *Du Moulin* (1) is an authority the other way. I also think that if the parties had intended to settle this interest of the Plaintiff's they would have settled it specifically by the settlement itself.

This being my opinion upon the first point, I need not go into the other question, which I should have taken more time to consider, namely, whether, if the Plaintiff's estate tail had become indefeasibly vested during the coverture, it would have been

(1) 2 K. & J. 186.

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included in the covenant, and if so, whether she could have been compelled to execute a disentailing deed.

The answer to the question in this case will be, that the Plaintiff is now seised of or entitled to the fee simple of one-third of the *Taunton Dean* estate.

Solicitors: Messrs. *Dangerfield & Fraser.*

BATEMAN *v.* GRAY.

M. R.
1868
June 20.

Will—Vesting—Gift to Children who should attain Twenty-one—Power of Advancement out of vested or presumptive Shares.

Where a gift to all the children of *A.* "now or hereafter to be born who shall attain the age of twenty-one years," was followed by a power of advancement out of the vested or presumptive share of any object of the gift:—

Held, that the class of children to take was not ascertained when the eldest child attained twenty-one.

Bateman v. *Gray* (1) reversed.

THIS case now came on to be heard on a Petition of re-hearing, and for further consideration. The original hearing is reported (1).

The testator, by his will, dated the 3rd of August, 1857, devised and bequeathed his real and personal estate upon trusts for conversion, payment of his debts, and investment of the residue; and directed that, subject to an appropriation of part of such investments to answer certain annuities thereby given, the trustees should stand possessed thereof upon the trusts following, that is to say, as to one equal undivided moiety thereof upon trust to pay to or otherwise permit his sister to receive and take the interest, dividends, and annual produce thereof during her natural life: and from and after her decease, then upon the trusts thereinafter declared with respect to the other moiety of the said general fund, after and subject to the annuities thereout thereinafter provided for the testator's brother, *James Bateman*, and *Catherine* his wife: and as to the remaining moiety of the said general trust fund,

(1) 29 Beav. 447.

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upon trust during the life of his said brother, *James Bateman*, out of the annual produce thereof to pay to the said *James Bateman* an annuity of £120: and from and after the decease of the said *James Bateman* upon further trust during the life of *Catherine Bateman*, his present wife, until she should marry again, out of the same annual produce to pay to the said *Catherine Bateman* an annuity of £100, and subject to the payment of the said two last-mentioned several annuities, upon trust that the said trustees should stand and be possessed thereof upon the trusts following (that is to say): "In trust for all and every the child and children of my nephew, *Thomas Bateman*, son of my said brother, *James Bateman*, now born or hereafter to be born, who shall attain the age of twenty-one years, for all and every the child and children of my niece *Catherine*, the wife of *Charles Robins* (a daughter of my said brother *James Bateman*) now born or hereafter to be born, who shall attain the age of twenty-one years, and for all and every the child and children of my niece *Clara Elizabeth*, the wife of *Philip Henry Barton*, now born or hereafter to be born, who shall attain the age of twenty-one years, and the same to go unto and equally among the said several children of the said *Thomas Bateman*, *Catherine Robins*, and *Clara Elizabeth Barton* absolutely, in equal shares, and they respectively to take *per capita* and not *per stirpes*: And I direct that the income arising from the presumptive share or respective shares of every or any such child or children shall be applied, if and as my said trustees shall think proper, for the maintenance and education of such child or children respectively until his or their majority, or marriage in the case of females, and the unapplied portion, if any, of such income shall be added to the principal of the share or shares respectively whence the same shall have arisen, but such accumulated fund, nevertheless, shall remain applicable, if occasion shall require, to the maintenance and education of the child or children from whose share or respective shares the same shall have arisen: And I also empower my trustees or trustee, in their absolute discretion, if occasion shall require, to apply any part not exceeding one-half of the capital of the vested or presumptive share or respective shares of any child or children of my said nephew and nieces for his, her, or their advancement in life."

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The bill was filed by the infant children of *Thomas Bateman*, who claimed maintenance out of the fund.

By the order made on the original hearing in 1861, it was declared that the class of children entitled to participate in the benefit of the bequest was to be ascertained when the eldest attained twenty-one.

The petition of rehearing was presented by a child born in 1865, after the eldest had attained twenty-one.

Mr. *Southgate*, Q.C., and Mr. *Bagshawe*, for the Petitioner:—

We admit that the ordinary rule is, that where there is a gift to a class of children, payable on their attaining twenty-one, the period of distribution is when the eldest child attains twenty-one: *Gillman* v. *Daunt* (1). But in this case the words of the will exclude the operation of the rule. The testator confers a power of advancement out of "vested or presumptive" shares; that shews that he must have intended all the children to be let in: *Iredell* v. *Iredell* (2).

Mr. *Jessel*, Q.C., and Mr. *Bury*, for the Plaintiffs in support of the decree.

Mr. *Pace*, for infants in the same interest with the Plaintiffs.

Mr. *Baggallay*, Q.C., and Mr. *Eddis*, for the tenant for life.

LORD ROMILLY, M.R.:—

The word "vested" is very strong, and I do not see how, in the face of it, the declaration can be supported. I must, therefore, set it aside.

Solicitors: Messrs. *Lewis & Watson*; Messrs. *Sharpe & Co.*

(1) 3 K. & J. 43. (2) 25 Beav. 485.

M. R.

1868

June 7.

HOOD *v.* LORD BARRINGTON.

Scotch Will—Executor—Leaseholds in England—Power to sell—21 & 22 Vict. c. 56, s. 12—Contract of Sale—Vendor not named—Statute of Frauds—Signature "for Vendors" not then ascertained.

Where confirmation of the executor of a person who has died domiciled in *Scotland* has been sealed with the seal of the Court of Probate, in manner provided by 21 & 22 Vict. c. 56, s. 12, the executor has all the powers of an ordinary English executor, and may sell and dispose of leaseholds in *England*, although they are specifically bequeathed, and although, by the law of *Scotland*, an executor cannot deal with leasehold property in that country.

The particular of sale of a leasehold house stated that it was the property of Admiral *F.* deceased, and that the sale was by direction of his executors, not naming them. A memorandum of the sale, endorsed on the particular, was signed by the auctioneers as agents "for the vendors." Admiral *F.* was a domiciled Scotchman, and had, by a testamentary instrument in the Scotch form, named seven persons, and the acceptors of them, as executors. Two only accepted office, and confirmation was granted to them subsequently to the contract of sale:—

Held, that the contract was valid, and specific performance of it decreed at the suit of the executors.

THIS was a suit for specific performance of an agreement for the sale of a leasehold house, No. 37, *Charles Street*, *Berkeley Square*, formerly the property of Admiral *Ferguson*, of *Pitfour*, in *Scotland*.

Admiral *Ferguson*, being a domiciled Scotchman, executed in *Scotland* a testamentary instrument in the Scotch form, dated the 4th of February, 1864, and thereby appointed the Hon. *A. N. Hood*, and his son, *George Arthur Ferguson* (the Plaintiffs in the present suit), and five other persons therein named, and the acceptors or acceptor, and survivors and survivor of them, to be his executors: and disponed and assigned to them all the real and personal estate which should belong to him at the time of his death, including, by a particular description, the above-mentioned house, upon trust, in the first instance, for payment of the testator's debts, and, subject thereto, the testator declared certain trusts of the said leasehold house for the benefit of his wife (who died in his lifetime) and of his three unmarried daughters during their respective lives, so long as they respectively remained unmarried: and, subject thereto, he limited the same premises, together with

certain Scotch heritable estates, to or in trust for his son, the Plaintiff, *George Arthur Ferguson*, whom failing, to the eldest son of the same Plaintiff, with divers limitations over in the Scotch form of testamentary disposition.

The testator died on the 15th of March, 1867. On the 20th of May, 1867, the instrument was carried into the Commissary Court of *Aberdeenshire* for confirmation: and by a confirmation under the seal of that Court, dated the 24th of June, 1867, the nomination of executors contained in the instrument was confirmed, and administration of the personal estate of Admiral *Ferguson* in *Scotland, Ireland*, and in *England*, was, in the Scotch form, granted to the Plaintiffs alone, the other persons named as executors having declined to accept the office.

On the 2nd of July, 1867, the confirmation was sealed with the seal of the Principal Registry of the Court of Probate in *England*.

On the 20th of May, 1867, Messrs. *Carlisle & Ordell*, "for and on behalf of Viscount *Barrington*" (the Defendant) signed a memorandum endorsed on a printed particular of sale, whereby Viscount *Barrington* acknowledged himself to have purchased the property described in such particular for the sum of £12,000, and to have paid the sum of £1200 as a deposit, and in part payment thereof, and he bound himself to complete the purchase according to certain conditions of sale therein specified. To this memorandum was subjoined an acknowledgment, signed by Messrs. *Rushworth, Jarvis, & Abbott*, auctioneers, in the following terms:—"As agents for the vendors, we confirm this sale, and acknowledge the receipt of the deposit."

The property described in the printed particular of sale was the leasehold house in question; and the particular was that of an intended sale by auction of the same house, which was therein described as belonging to the late Admiral *Ferguson*, and the sale was thereby expressed to be by direction of the executors. The sale to the Defendant was by private contract.

The Defendant was advised that the Plaintiffs had no power to sell the house under the instrument of the 4th of February, 1864, and he refused to complete the contract on this ground alone, having accepted the title in all other respects. Thereupon the present suit was instituted.

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The Defendant, by his answer, raised the objection, that inasmuch as neither the particular of sale, nor the memorandum signed by his solicitors, mentioned the names of the vendors, the memorandum did not constitute a valid agreement or memorandum of an agreement for the purchase of the leasehold premises.

The cause now came on to be heard.

Mr. *Jessel*, Q.C., and Mr. *Vaughan Hawkins*, for the Plaintiffs:—

The power of the Plaintiffs to sell depends on their being executors, and their title as executors depends not on the testamentary instrument executed by their testator, but on the probate. By 21 & 22 Vict. c. 56, s. 12, the confirmation of the executor of a person who has died domiciled in *Scotland*, when sealed with the seal of the Court of Probate, has "the like force and effect in *England* as if a probate had been granted." It is clear, therefore, that the Plaintiffs may make a title to the leasehold property in *England* just as if they had been named executors by an English instrument.

As to the contract for sale being invalid, if that be so, every broker's note is an invalid contract.

Sir *Roundell Palmer*, Q.C., Mr. *Anderson*, Q.C., and Mr. *Ramadge*, for the Defendant:—

First: To constitute a valid and binding contract of sale, the names of the vendors must appear in the memorandum: *Wheeler* v. *Collier* (1); *Jacob* v. *Kirk* (2); *Dart's* Vendors and Purchasers (3) It may be said that as the sale is expressed to be by direction of the executors of Admiral *Ferguson*, the vendors are sufficiently designated; but the sale took place before confirmation was granted to the Plaintiffs, and while it was uncertain who would accept the office of executors. The contract, if there be one, is with the Plaintiffs and the five other persons named as executors in Admiral *Ferguson's* will. The Defendant clearly could not have sued the Plaintiffs immediately after signing the contract; nor could he have sued the auctioneers, as they signed as agents

(1) M. & M. 123. (2) 2 M. & Rob. 221.
(3) 3rd Ed. p. 140.

only: *Lewis* v. *Nicholson* (1); *Deslandes* v. *Gregory* (2); *Sugden's* Vendors and Purchasers (3). There is, therefore, no mutuality in the contract.

Secondly: The title of the Plaintiffs depends on the instrument, and not on the probate. The probate is merely "the authenticated evidence, and not at all the foundation of the executor's title:" *Williams* on Executors (4). The effect of the statute 21 & 22 Vict. c. 56, is to make a confirmation duly sealed equivalent to probate of the will of a domiciled Scotchman, and nothing more. The effect of a will is in all respects governed by the law of the domicil: *Enohin* v. *Wylie* (5); *Laneuville* v. *Anderson* (6). Hence, to determine the powers of persons invested with the office of executor, you must refer to the law of the place of domicil. Now, by the Scotch law, leaseholds are heritable property, and an executor in *Scotland* cannot deal with them. Hence, as executors the Plaintiffs can make no title, neither can they as trustees of the testamentary instrument, for the house is specifically given to them upon trust for divers persons for life with remainders over. A purchaser from the Plaintiffs without the consent of the *cestuis que trust* would run the risk of being involved in a Scotch suit for the administration of the trusts of the will.

At all events, this question is entirely new; and a title depending on it ought not to be forced on a purchaser: *Pyrke* v. *Waddingham* (7).

LORD ROMILLY, M.R.:—

I am of opinion that if I were to allow any part of these objections, I should be shaking settled rules to their foundations. The first objection is, that the contract is invalid because it was only signed by agents, and because the names of the principals were not disclosed. In modern times, most of the sales by auction take place in that manner; but this, I think, is the first occasion upon which an attempt has been made to set aside a contract, or to deny that a contract is valid, because an auctioneer on the one

(1) 18 Q. B. 503.
(2) 2 E. & E. 602.
(3) 14th Ed. p. 44.
(4) 6th Ed. p. 282.
(5) 10 H. L. C. 1.
(6) 6 Jur. (N. S.) 1260.
(7) 10 Hare, 1.

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side for the vendor, and certain solicitors for the purchaser on the other, sign a contract on behalf of their principals. It is not disputed that these persons were the agents of the principals, and therefore the principals are bound. And all those observations which apply to some alteration in the modern law, as to whether an action can be brought against the auctioneer or the agent where the principal is not bound, do not apply to this case, and may be wholly disregarded. In this case it is certain that the principals are now known, and that the agency is not disputed. The principal is bound by the acts of his agent, and all the observations to be found in the modern books about the inconvenience of allowing an agent to act for an undisclosed principal are inapplicable, because in this case the principals are now disclosed, and the contract is between the principals on each side. In fact, it is scarcely possible to look at an auction list without seeing property sold by a mortgagee, or by executors, or by trustees, without the name being disclosed, and bought by somebody, whose name is not given until the conveyance is prepared. It is the ordinary practice, and it is impossible that I can set aside a contract because the name was not given, or because at the time the vendors had not completed their title as executors in this country.

The other question has been argued on a totally different principle. It is the settled law of this country that probate is the sole title of the executor, that that title cannot be disputed; that until the probate is recalled every act that the executor does is valid in a Court of justice, and that he alone can bring an action or a suit with respect to what the English law calls personal estate. The question here is this, what title is given to the Plaintiffs by this Act of Parliament? The Act of Parliament provides as follows:—[His Lordship read sect. 12.] The consequence of this is that the person who has obtained the confirmation duly sealed is in exactly the same situation as the person who has obtained probate, and until it is recalled he has the title of an executor. He alone can sue or be sued in this country; with it his title cannot be disputed, and without it, it cannot be maintained. Of course I do not go into those cases in which the probate happens to be lost, and secondary evidence allowed to be given of it; they have nothing to do with the present question. Then it is said that the

executors by selling in *England* commit a breach of trust, and that consequently any person who buys from them will be liable in a Scotch Court of justice for a breach of trust. Upon that my observation is twofold. In the first place, if these gentlemen really are committing a breach of trust by the sale of this property, the proper course is to apply for an interdict in *Scotland*, or for an injunction in *England*, which this Court would immediately give effect to, and restrain them from selling property which they were selling in breach of trust. About that there is no difficulty. The Courts of one country are ancillary to the Courts of another. Immediately on finding that the Court in *Scotland* had granted an interdict against the sale of the property, this Court would have prevented the sale, just as in this country, where an executor has the probate and is entitled to sell, but is about to sell improperly, this Court will interfere and restrain him by injunction from enforcing the rights and the title which the law gives him. Again, it is to be observed that this is an Act of Parliament made by the Imperial Legislature, which has force in *Scotland* as well as in *England*. It is not the ordinary case of an Act relating solely to the laws of this country, and it enacts that in the case of a foreign will the persons who bring the confirmation from *Scotland* to *England* shall have here the same rights as an executor who has obtained probate. That is an Act of Parliament which binds persons in *Scotland*; probably it was passed for the benefit of persons in *Scotland*, but it is clear that it is not like an Act of Parliament in this country made to apply to *Russia* or to *France*, which could have no effect upon any person out of the Queen's dominions in respect of property beyond the jurisdiction of Parliament. I confess I was very much startled when, as I understood the argument, it was intimated that this would be a breach of trust, and that the purchaser would be liable to the consequences in a Scotch Court of justice. If so, no person under this probate could sell a horse, or a carriage, or any other chattel in this country, he could not sell any stock, nor get it transferred into his own name. Probably the Legislature passed the Act in the confidence that if a person intended to abuse those particular powers, and intended to apply them to his own interest or any fraudulent purpose, an interdict or injunction would restrain him from so doing; but that it was for the interest of all parties that

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the title for realizing the property should be as perfect in *England* with respect to English property as it is with respect to Scotch property in *Scotland*. I assume that the parties are here acting *bonâ fide;* if the executors are acting corruptly or improperly then I should be ready to hear at any moment an application in effect saying that this is not a contract which ought to be carried into execution. But what I am now looking at is this, whether the Plaintiffs have authority to sell, and whether the Defendant will get a good title by a conveyance from them. I say that all principle and authority establishes the proposition that they will.

A great deal of stress has been laid on the case of *Laneuville* v. *Anderson* (1), in which the question was, whether the Court of Probate should grant probate or not; and, finding by the law of the foreign country that the executor was not entitled to probate after the lapse of a year, and a year having elapsed, the Court of Probate refused to grant probate. Why did the Court refuse it? For this reason, that if granted, everybody dealing with the executor would have been safe, it being the first principle of the English law that, relating to all matters of personal property, the probate is the sole document of title. And when Mr. *Anderson* says: "We refer to the will, it is not the probate which gives the power, but the will which gives the power," I dissent from the proposition stated in that form. What the will does is, it gives the power to obtain the probate, but when once the probate is obtained the probate confers the power and the title on the executors to dispose of the property as they think fit. I think it is impossible to throw the slightest slur or cloud upon the title; and therefore I am of opinion that the Plaintiff is entitled to a decree for specific performance, and it will be for the benefit of the Defendant's title that the decree should be made with costs.

Solicitors for the Plaintiffs: Messrs. *Farrer, Ouvry, & Farrer.*
Solicitors for the Defendant: Messrs. *Carlisle & Ordell.*

(1) 6 Jur. (N.S.) 1260.

QUINN *v.* BUTLER.

M. R.
1868
July 6, 7.

Will—Codicil—Revocation—Charge—Invalid Appointment.

A testator, having a power by will to charge certain hereditaments with £7000, to be divided amongst his children in such shares as he should by will appoint, and in default amongst them equally, by his will charged the hereditaments with the £7000, and directed that £4000, part thereof, should be paid to his younger son, and the remaining £3000 to his three daughters equally. By a codicil he revoked the appointment or charge of £7000 made by his will, and charged the same hereditaments with the payment of £7000 to the younger son alone:—

Held, that though the appointment made by the codicil was invalid, the revocation nevertheless took effect.

Tupper v. *Tupper* (1) followed. *Onions* v. *Tyrer* (2) explained.

RICHARD FOWLER BUTLER was, under the will of his father *Thomas L. Butler*, empowered by deed or will to charge certain hereditaments thereby devised with the payment of any sum or sums of money not exceeding £7000 as a provision for his younger children, the same to go and be paid to or divided among them in such shares as the said *Richard Fowler Butler* by deed or will should appoint, and in default of such appointment to go to and be divided amongst all such children equally.

Richard Fowler Butler, by his will, dated the 13th of November, 1856, after reciting the above-mentioned power, in exercise thereof charged the said hereditaments with the payment of the sum of £7000 in manner thereinafter mentioned (that is to say), £4000, part thereof, to be paid to his son, *Robert Henry Fowler Butler*, in case he should attain the age of twenty-one years: and the sum of £3000, residue thereof, to be paid to his said three daughters, *Eleanor Quinn*, *Sarah Fowler Butler*, and *Mary Fowler Butler*, in equal shares as tenants in common, and in case of the decease of the said *Robert Henry F. Butler*, before he should have attained the age of twenty-one years, then the said sum of £4000 to be paid to and divided amongst his said three daughters in the like manner as the said sum of £3000.

By a codicil, dated the 7th of September, 1861, *Richard Fowler*

(1) 1 K. & J. 665. (2) 1 P. Wms. 343.

M. R. 1868 QUINN v. BUTLER.

Butler, after reciting the appointment made by his will, proceeded as follows:—"I hereby revoke and make void the bequest and appointment or charge of the said sum of £7000 so made by my said will as aforesaid; and I, the said *R. F. Butler*, in exercise and by force and virtue of the powers or authorities given me in the said will of the said *T. L. Fowler*, and of all other powers enabling me in this behalf, do hereby subject, charge, and make liable all and every the manors, messuages, farms, lands, and hereditaments devised by the said will of the said *T. L. Fowler*, to and with the payment to my son *Robert F. Butler*, who has attained the age of twenty-one years, of the sum of £7000 sterling money, and in all other respects I confirm my said will."

The suit was instituted by *Eleanor Quinn* and her husband for the purpose (amongst others) of obtaining a declaration that *Eleanor Quinn* was entitled to have her share under the will of *Richard Fowler Butler* raised out of the hereditaments on which the £7000 was charged; and it now came on to be heard upon further consideration.

Mr. *Baggallay*, Q.C., Mr. *Eddis*, and Mr. *Winn* (of the Irish Bar), for the Plaintiffs:—

The power contained in the will of *Thomas L. Butler* is two-fold: first, it enabled *Richard Fowler Butler* to charge £7000 on the hereditaments thereby devised: and, secondly, it enabled him to portion it out amongst his younger children. The codicil merely revoked the distribution made by the will, and left the charge intact, but gave the whole £7000 to one of the younger children: that fails because the testator had not an exclusive power of appointment: and therefore the £7000, which was validly charged, goes under the will of *Thomas L. Butler* amongst the younger children of *Richard Fowler Butler* equally.

But if it should be considered that the codicil revokes the charge created by the will, still that revocation was only for the purpose of giving effect to an appointment which fails, and therefore the will remains in force: *Onions* v. *Tyrer* (1); *Ex parte Earl of Ilchester* (2); *Eilbeck* v. *Wood* (3).

(1) 1 P. Wms. 343. (2) 7 Ves. 348.

(3) 1 Russ. 564.

Mr. *Southgate*, Q.C., for *Sarah Fowler Butler* and *Mary Fowler Butler*, stated that they declined to claim any benefit under the will of *Richard Fowler Butler*.

Mr. *Jessel*, Q.C., and Mr. *North*, for *Robert Fowler Butler*, who, by the death of an elder brother, had become entitled to the estates charged with the payment of £7000:—

The principle of *Onions* v. *Tyrer* (1) does not apply "where the second devise fails, not from the infirmity of the instrument but from the incapacity of the devisee:" *Jarman* on Wills (2); *Tupper* v. *Tupper* (3); *Nevill* v. *Boddam* (4).

As to the codicil merely revoking the mode of distribution, it is, on the contrary, an express revocation of the charge.

Mr. *Bristowe*, for trustees.

Mr. *Baggallay*, in reply:—

The judgment in *Tupper* v. *Tupper* supports my contention in this case. There is no expression of any intention to revoke the will except to carry out another disposition: that disposition fails: and in principle the case cannot be distinguished from *Onions* v. *Tyrer*.

July 7. LORD ROMILLY, M.R.:—

In this case I am of opinion that the codicil is a simple revocation of the appointment made by the will, and nothing more.

I think the whole question depends on the intention of the testator. If a will is simply revoked in order to make a gift in favour of another person, and you can see that there is no intention to revoke unless for that purpose, then the doctrine of *Onions* v. *Tyrer* applies. The case has generally arisen where there has been a defective execution of the second instrument.

Here there can be no doubt that the intention was to revoke the will altogether. The codicil is an absolute and positive revocation of the charge: then there is a new charge of £7000, and the whole

(1) 1 P. Wms. 343.
(2) 3rd Ed. vol. i. p. 156.
(3) 1 K. & J. 665.
(4) 28 Beav. 554.

M. R. 1868 QUINN v. BUTLER.

of that is given to the son. That gift is void, because the testator had not an exclusive power of appointment. I entirely assent to the observation of Lord Justice *Page Wood* in *Tupper* v. *Tupper* (1), where he remarks that the testator expressly says by the codicil that the legatees shall not receive anything, but that the fund shall be given to another object; and that although this latter person cannot take the gift, the Court cannot speculate on whom the testator might have wished to confer the benefit in such an event. That case was decided on an old case, *French's Case*, in *Rolle's* Abridgment (2), to the same effect.

I think it is impossible to draw a distinction so technical as to say that the codicil shall prevail or not according as the person named in it can take or not. The reasonable view is to consider the intention of the testator: and here I think the codicil revoked the old appointment and charge but did not set up a new one.

Solicitors: Mr. *W. Thomas*; Messrs. *Wm. Braikenridge & Sons.*

M. R. 1868 *June* 19.

KERNAGHAN *v.* WILLIAMS.

Company—Ultrà Vires—Illegal Application of Funds—Prosecution of Suit not instituted by Company.

A railway company has no power to expend its funds in the prosecution of a suit not instituted by it, and a Court of Equity will, at the instance of a shareholder, restrain it from doing so, without going into the question whether or not the suit is proper, or for the benefit of the company.

Eq 333, 34, 2,

IN August, 1867, *Samuel Williams* and three others, shareholders in the *Dublin Trunk Connecting Railway Company*, instituted a suit (*Williams* v. *O'Meara*) on behalf of themselves and all other the shareholders, except such as were Defendants, against the company and the directors and several persons (including the present Plaintiff, *Baptist Kernaghan*, the solicitor of and a shareholder in the company) to whom they alleged that the directors had improperly issued paid-up shares or paid moneys of the company, for

(1) 1 K. & J. 665. (2) Devise, O. 4.

the purpose of recovering for the company moneys alleged to have been misapplied, and cancelling paid-up shares, and restraining *Kernaghan* and other Defendants from enforcing judgments against the company alleged to have been obtained by collusion with the directors, and restraining the directors from applying the funds of the company towards payment of the expenses of certain applications to Parliament. That suit was instituted in consequence of an investigation of the affairs of the company by a committee appointed by the shareholders, of which *Williams* and two of the other Plaintiffs in that suit were members.

In September, 1867, the board of directors was changed, and *Williams* and two of his co-Plaintiffs became directors.

On the 18th of March, 1868, an extraordinary general meeting of the company was held, at which the following resolution was passed, viz.: "That the directors be and they are hereby authorized to take such steps for the purpose of prosecuting the suit of *Williams* v. *O'Meara and others* for the benefit and at the expense and risk of the company, as from the commencement thereof, or otherwise in reference to the said suit as they may be advised."

On the 28th of May, 1868, *Kernaghan* filed the bill in this suit on behalf of himself and all other the shareholders in the company, except the Defendants, against the present directors and the company, by which he alleged that the directors had applied, and intended to apply, moneys of the company in or towards payment of the charges and expenses of the Plaintiffs in *Williams* v. *O'Meara*, and for other purposes not authorized by their Acts, and prayed for a declaration that such application was illegal, for an account and repayment to the company by the directors of the moneys so applied, and for an injunction restraining the Defendants from applying any of the funds of the company for the costs, charges, or expenses of the Plaintiffs in *Williams* v. *O'Meara*, or for such other purposes as aforesaid.

This was a motion for an interim injunction in the terms of the prayer of the bill. One of the directors made an affidavit in which he denied that any payment had been made out of the funds of the company on account of the costs in *Williams* v. *O'Meara*.

M. R. 1868 KERNAGHAN v. WILLIAMS.

Mr. *Jessel*, Q.C., and Mr. *Townsend*, for the Plaintiffs:—

The company has no power to apply its funds in prosecuting a suit not instituted by it, and this Court will restrain it from doing so, as in the case of an application to Parliament for powers to extend the business of the company: *Simpson* v. *Denison* (1), and other authorities, collected in *Hodges* on Railways (2).

Mr. *Roxburgh*, Q.C., and Mr. *Bagshawe*, for the Defendants:—

The suit of *Williams* v. *O'Meara* was instituted, upon the recommendation of a committee appointed by the shareholders, for the purpose of recovering for the company funds which have been misapplied by the directors; it is, therefore, a suit entirely for the benefit of the company. In the case of an application to Parliament a company applies its funds to a purpose clearly not within the objects for which it was incorporated; but a company may sue to recover its property, and spend its money for that purpose. It would have been the duty of the directors to institute a suit in the name of the company for the purpose for which *Williams* v. *O'Meara* was instituted, and why should they not adopt that suit, so as to avoid the delay of taking proceedings *de novo*? We submit that the company were entitled to take that course, and that it being a matter within their discretion, the Court will not interfere: *Foss* v. *Harbottle* (3). The object of the present suit is simply to prevent the company from recovering from the present Plaintiff, who was their solicitor, what he has improperly obtained from the former directors. This bill was not filed for more than two months after the passing of the resolution of the 18th of March, and the delay alone is sufficient to prevent the Court from granting an interlocutory injunction.

LORD ROMILLY, M.R.:—

I am clearly of opinion that this resolution was *ultrà vires* of the company, and that the majority of the shareholders have no power in such a matter to bind the minority. It is important to consider this, that I must try the propriety of the suit of *Williams* v. *O'Meara*.

(1) 10 Hare, 51. (2) Page 71, 4th Ed.
(3) 2 Hare, 461.

if they had the power. Mr. *Bagshawe* pressed on me very strongly that nobody denies the propriety of that suit; but it would be very improper for me to attempt to try the propriety or the fitness of that suit. If a railway company, by its directors, or by giving a notice to its shareholders, can adopt any suit, however fit or proper, it is quite clear they may adopt any suit however unfit or improper; and this Court cannot try the propriety of that suit, which is a collateral question, in determining whether it shall allow the funds of the company to be expended in carrying on that suit. Observe what a strange and anomalous position the case is in at the present moment. This is a suit instituted in the month of August of last year by *Williams* and others, on behalf of themselves and the other shareholders, except the Defendants, against the directors and against the company, which necessarily must be a party to that suit. By some arrangement, either by the interposition of Parliament, or the interposition of the shareholders, the shareholders do what they had a perfect power to do, remove all the directors, and appoint fresh ones; in fact, they turn the Plaintiffs in that suit into the directors, and they turn the Defendants out from their former situations as directors. Then the company, who are Defendants to that suit, call a general meeting to sanction and approve of the carrying on and the payment of the expenses of the suit to which they are Defendants. That seems of itself a somewhat anomalous proceeding, and it is admitted that I cannot go into the merits of or discuss that case. If Mr. *Williams* is right in the suit he has instituted, he will obtain a decree, and he will obtain, as the results of the suit, the costs; if he is not right, then he will not; and this, unquestionably, is certain, that if he succeeds, when the suit is over the company cannot come and claim the amount of funds recovered by that suit for their benefit without paying the expenses incurred. It is impossible that this Court can permit a company to take upon itself to sanction, approve of, and pay the expenses of a suit in which they are not Plaintiffs, and in which they may or may not be Defendants. Where, as in this case, they are Defendants, it only makes it so much the worse. I am of opinion, therefore, that the injunction must go in the present case. The Defendants must not spend any of the funds for that purpose. I will make the costs of this

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motion costs in this cause. The notice of motion is too wide, and the injunction will only restrain them from applying the funds for or towards the costs, charges, or expenses of the Plaintiffs in *Williams* v. *O'Meara*.

Solicitors for the Plaintiffs: Messrs. *Hurford & Taylor*.

Solicitors for the Defendants: Messrs. *Hayes, Twisden, Parker, & Co.*

M. R. 1868 *June* 12, 22.

In re CHINA STEAM SHIP COMPANY.

DAWES' CASE.

Winding-up—Contributory—Time of Commencement of Voluntary Winding-up—Cancelling of Forfeiture by Liquidators—Companies Act, 1862, *ss.* 129, 130, 131.

When a company is wound up voluntarily by means of a preliminary and a confirmatory resolution under sects. 129 and 130 of the *Companies Act*, 1862, the commencement of the winding-up dates from the passing of the second resolution.

Where a forfeiture of shares has been validly made by the directors of a company before the commencement of a winding-up, the liquidators have no power, under sect. 131 of the Act, to cancel such forfeiture.

Accordingly, where the directors of a company had forfeited the shares of *D.* for non-payment of calls after the passing of a preliminary resolution to wind up, and before its confirmation, and the liquidators had subsequently agreed with *D.* to cancel the forfeiture:—

Held, that the forfeiture was valid; that the liquidators had no power to cancel it; and that *D.* could not be made a contributory.

THE question in this case, which came before the Court on an adjourned summons, was whether the name of Mr. *Dawes* should be placed on the list of contributories of the *China Steam Ship Company, Limited*.

In and prior to November, 1866, *Dawes* was the registered holder of forty shares in the company, which was registered under the *Companies Act*, 1862.

On the 26th of November, 1866, at a general meeting of the company, it was resolved "that the company be wound up voluntarily, with a view to its ultimate dissolution and reconstruction, and that the winding up thereof commence immediately from the

time when this resolution for the winding up thereof shall have been duly confirmed;" also "that three gentlemen be appointed liquidators for the purposes of the winding-up, who were authorized to concur in the establishment of a new company, to be incorporated by the name of the *Labuan Company, Limited.*"

On the 27th of November, 1866, the directors made a call payable on or before the 10th of December, 1866, and notice of this call, and of the meeting to be held to confirm the resolution, was sent to all the shareholders. *Dawes* did not pay his call.

On the 17th of December, 1866, which was two days before the meeting when the resolution to wind up was confirmed, the directors resolved that *Dawes'* shares, with certain others, should be forfeited for non-payment of the call.

On the 19th of December another general meeting of the company was held, at which the resolutions passed at the previous meeting of the 26th of November were confirmed.

In February, 1867, *Dawes*, against whom an action had been commenced for the amount of his call, wrote to the secretary of the company requesting to be restored to the list of shareholders, and, if so, undertook to take shares in the new company.

On the 28th of March, 1867, two of the three liquidators assented to this proposal, and agreed to cancel the forfeiture, and to allot him shares in the new company. The amount due upon the call was paid.

In August, 1867, an order was made by the Court to wind up the company under supervision; and as *Dawes* now desired to be relieved from his liability, the official liquidator brought the matter before the Court,—the questions being whether it was competent to the directors, after the resolution to wind up voluntarily, but before its confirmation, to forfeit the shares, and whether, supposing such forfeiture was valid, the liquidators had power, after the winding-up, to enter into an agreement to restore him to the list of shareholders.

Mr. *Roxburgh*, Q.C., and Mr. *Wickens*, for the official liquidator:—

The first question in this case is, whether the voluntary winding-up commenced from the passing of the resolution of the

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26th of November, or from the time of its confirmation at the subsequent meeting. We submit that the former is the time from which it dates, and therefore that the directors had no power on the 17th of December to declare the shares forfeited.

By sect. 130 of the *Companies Act,* it is provided that a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up. The words "passing a resolution" refer only to the first resolution, for in the definition given by sect. 51 of "a special resolution," it is said that "a resolution passed by a company" shall be deemed special when it has been passed by three-fourths of the members, and confirmed by a general meeting. It follows that the passing of the resolution takes place at the first meeting, not at the meeting when it is confirmed. And when a resolution is required to be special for the purposes of the Act, such special resolution dates from the time when it is passed, provided that it is confirmed at the subsequent meeting. If the resolution is not confirmed, it goes for nothing, but if it is confirmed, its confirmation dates back so as to render invalid any intermediate act by the directors.

Secondly, we contend that, even if the winding-up commenced from the 17th of December, 1866, when the resolution was confirmed, so that the forfeiture of the shares was valid, yet the liquidators had power under sect. 131 to restore the forfeited shares, and that having been done at the request of *Dawes,* and acquiesced in by him, he is now properly made a contributory.

Mr. *Jessel,* Q.C., and Mr. *Eddis,* for Mr. *Dawes*:—

The voluntary winding-up did not commence from the mere passing of the resolution, but from the time of the meeting when it was confirmed, which alone authorized the winding-up. The 131st section would be unmeaning on the other construction. That the construction we contend for is correct also appears from sect. 161, which clearly relates to the time of confirmation, and there is nothing in sect. 51 to warrant the contention on the other side. It follows that the forfeiture, being an act done before the true commencement of the winding-up, was good.

Further, the liquidators had no power under sect. 131 to cancel the forfeiture. That section refers to "transfers of shares

with the sanction of the liquidators." A transfer of shares is altogether different from cancelling a forfeiture, which is a discretionary power vested in directors, and, if exercised after the commencement of a winding-up, must be exercised by them with the sanction of the liquidators. Besides, in the definition of the powers of a liquidator in sect. 95, there is no mention of the power to cancel shares.

The result is that the forfeiture is valid, and unaffected by the subsequent proceedings, so that *Dawes* cannot now be made a contributory.

Mr. *Roxburgh*, in reply.

June 22. LORD ROMILLY, M.R. :—

The question on this summons is, whether Mr. *Dawes* is one of the contributories of the company, and ought to be on the list?

It involves two points: First, whether in the case where the voluntary winding up of a company depends on two resolutions of the company, the one confirming the other, the date of the commencement of the winding-up is fixed at the time of the first or of the second resolution: secondly, whether, after the voluntary winding-up has begun, the official liquidator can enter into a valid agreement with a former shareholder to restore him to the list of shareholders. [His Lordship then stated the facts of the case.]

The first question is that on which the validity of the forfeiture of the shares depends, for if the winding-up commenced on the 26th of November, 1866, the forfeiture of the shares on the 17th of December was null and void.

The 130th section provides that a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up.

The 129th section provides that a company may be wound up voluntarily whenever it has passed a special resolution so to be wound up.

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Sect. 51 defines what is a special resolution.

It is clear that the voluntary winding-up may be effected by one meeting under *placitum* 3 of sect. 129, and when that takes place, of course the winding-up commences from the passing of that resolution. But that may be disregarded for the present purpose, as no such resolution was passed in the present case, and the proceedings were under the second *placitum* of sect. 129, explained by sect. 51, which requires a second and confirmatory resolution at a meeting duly convened for that purpose at an interval of not less than a fortnight.

The first resolution clearly does not authorize the winding-up, and if the company at the second meeting do not confirm the first resolution, it is of no efficacy at all. I think that this is decisive of the question that the voluntary winding-up commences from the date of the passing of the confirmatory resolution; for according to the 131st section, this follows—that if the winding-up commences from the date of the first resolution, then all the business of the company *ipso facto* ceases, and, that being so, what becomes of the company, and what is to take place if the second resolution is not carried and the company has ceased to carry on business? Can it resume its business? and if it can, must it not be at a very serious loss, which, if the company was already failing (a thing to be assumed from the passing of one resolution), would probably complete its ruin?

Again, the clause speaks of the sanction of liquidators being necessary for the acts of a limited character, which may be done after the winding-up commences. But there is no liquidator, and there cannot be any liquidator, until the second and confirmatory resolution has been passed.

Again, the 161st section is inconsistent with any period for the commencement of the winding-up prior to the passing of the second resolution, for it enacts that if any person, who has not voted at either meeting in favour of the voluntary winding-up, should dissent, and should express such dissent in writing to the liquidators within seven days after the special resolution has been carried, he may require the liquidators at their option to do one of three things, the first of which is to abstain from carrying such resolution into effect, that is, the resolution to wind up the com-

pany; but if the company has already begun to be wound up fourteen days before at the passing of the first resolution, this clause is unmeaning, for the shareholder can only give the dissent in case he has not voted for the resolution at either meeting.

Besides which, the liquidators are only appointed at the second meeting. It is also against the scope and policy both of the Law and of the Act itself to give *ex post facto* effect or invalidity to any action of a company, and the *ex post facto* operation of the statute is confined in cases of voluntary winding-up to the staying of suits and actions by sect. 148, and then only on the presentation of a Petition, and also in the case of compulsory winding-up to the presentation of the Petition, which must be duly served and duly advertised. There are other matters in the Act confirmatory of this construction, but I think it unnecessary further to refer to them. What I have stated is, in my opinion, sufficient to shew that when a company is wound up voluntarily by means of a preliminary, followed by a confirmatory resolution, the commencement of the winding-up dates from the passing of the second resolution.

I am therefore of opinion that the forfeiture of the shares of Mr. *Dawes* was validly made on the 17th of December, 1866, and that he thereupon ceased to be a member of the company.

The next question is whether, by reason of the facts I have already detailed, Mr. *Dawes*, having since paid his call and requested to have his forfeiture cancelled, has been restored to the company, and is now one of the contributories thereof?

In the first place, I think the liquidators had no power to cancel the forfeiture and to take back Mr. *Dawes* as a contributory. If they had such a power, it is under the 131st section, but this clearly does not give any such power, and the only power given by it being the transfer of shares to the liquidators, or to another person with their sanction; everything else is made void by the section; and indeed it is under this section that the forfeiture of the shares of Mr. *Dawes* would be void if the winding-up had commenced prior to the 17th of December, 1866. But such a power in the liquidators as that of cancelling the deliberate act of the directors at a board meeting, done prior to their appointment, is a thing obviously never contemplated by the Act, and wholly beyond their

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powers. But the matter does not rest there; for Mr. *Dawes'* application was not to cancel the forfeiture of his shares, but to allow him to substitute for the shares so forfeited others belonging to a new company, to be formed and carried on by the members of the old company. This, in fact, was never done, nor had the liquidators any power to form a new company, or, indeed, do anything except such acts as were necessary and advantageous for the purpose of winding up the old company.

I am of opinion that, assuming that the forfeiture by the directors of the shares of Mr. *Dawes*, made on the 17th of December, 1866, to be *intrà vires* and valid, this forfeiture has never been validly cancelled by any competent authority, and that, as Mr. *Dawes* has paid the call for non-payment of which the shares were forfeited, he has no further liability towards the company, and he is not a contributory, and his name cannot be put on the list, or, if placed on it, it must be removed. I can give no costs. His own blundering has occasioned what has taken place, and the official liquidator must have his costs out of the estate.

Solicitors for the Liquidators: Messrs. *Mackenzie, Trinder, & Co.*

Solicitors for Mr. *Dawes:* Messrs. *Mercer & Mercer.*

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In re SMITH, KNIGHT, & CO.

WESTON'S CASE.

Company—Transfer of Shares—Irresponsible Transferee—Power of Directors to reject Transfer—Rectification of Register.

In addition to any discretion expressly conferred on them by the articles of association, the directors of a company have vested in them a discretion to refuse to register a transfer of shares, in cases where the proposed transfer would be contrary to the interests of the shareholders. Such discretion is, however, not arbitrary, but must be exercised in a just and reasonable manner.

Where, therefore, a company was in difficulties, and a transfer was made to a person whose address was incorrectly given in the transfer, and who could not be found:—

Held, that the directors were justified in refusing to register the transfer; and the Court refused, after a winding-up order had been made, to rectify the

register by inserting the name of the transferee, it appearing that the transfer was made for the purpose of avoiding liability, and that the transferee was not a person of means.

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Revd by H. & Ch. 2

IN and prior to June, 1866, *Edward Weston* was the holder of eighty-five shares in *Smith, Knight, & Co., Limited.* On the 18th of that month he executed a transfer of fifty of these shares to *James Birnie,* who also executed the transfer on the same day. On the 19th of June the transfer was left at the company's office for registration, and along with it were also left the certificates of the shares proposed to be transferred.

The material clauses of the articles of association relating to transfer of shares are the following:

"13. . . . No transfer of any share shall be entered on the register unless duly executed both by the transferor and the transferee; and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered on the register in respect thereof.

"14. The directors may refuse to register the transfer of any share in either of the following cases:—If the transfer is made by a member who is indebted to the company; if the transferee shall fail to comply with the request made in pursuance of the next article.

"15. Before approving or registering any instrument of transfer of any share, the directors may, if they think fit, require the transferee to produce to and leave with the secretary for examination the certificate of the share proposed to be transferred."

It appeared that the sale to *Birnie* was negotiated through a Mr. *Wright,* a civil and mining engineer in the City of *London. Birnie* was a relative of *Wright's,* and was occasionally employed by him in his business. At the date of the transfer *Birnie* was residing as a guest in *Wright's* house, which was given in the transfer as *Birnie's* address. It did not appear where *Birnie's* usual place of residence was, nor what were his ordinary means of livelihood. The consideration for the transfer of the shares was £50, and it was admitted on the one hand that the transferor parted with his entire interest in the shares, and on the other, that he executed the transfer with the intention of escaping from all future liability in respect of the shares.

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Upon the transfer coming in for registration, the directors caused inquiries to be made respecting *Birnie* at the address given; and were informed that he did not reside there but was a friend of the occupier of the house. They then applied at *Wright's* business offices, and were informed by a clerk that, to the best of his belief, *Birnie* was not employed there; but *Wright*, happening to overhear the inquiries, stated that *Birnie* was a clerk of his but was then absent on business. Under these circumstances, on the 22nd of August the secretary of the company wrote to *Weston's* solicitors a letter stating, that as *Birnie's* address could not be ascertained, and was incorrectly stated in the transfer, the company must decline to register it.

On the 19th of July a Petition had been presented for winding up the company. On the 28th of July the Petition was directed to stand over until Michaelmas Term. On the 14th of November a resolution was passed to wind up the company voluntarily. On the 30th of November this resolution was confirmed: and in December an order was made on the Petition continuing the winding-up under the supervision of the Court.

No further application in respect of the transfer was made by *Weston* after the 22nd of August and before the order on the Petition was made. His name being on the register at the date of that order, was placed on the list of contributories: and he now applied by summons that his name might be removed from the register and that *Birnie's* name might be substituted.

It appeared that subsequently to the 22nd of August a considerable number of transfers were registered.

Mr. *Roxburgh*, Q.C. and Mr. *Marten*, for *Weston*:—

The directors have no power, under the articles, to reject a transfer except on the grounds mentioned in clause 14, neither of which applies. By the 22nd section of the *Companies Act*, 1862, shares are made transferable in manner provided by the regulations of the company; it is therefore a matter of contract between the company and its shareholders that shares may be transferred in every case except where there is an express provision to the contrary. It has been decided that the directors cannot refuse to register a transfer on the ground that the transferee is a man of

straw, unless, indeed, the transferor retain an interest in the shares: *Budd's Case* (1); *De Pass's Case* (2); *Hyam's Case* (3); and all these cases have recently been approved of by Lord Justice *Rolt* in *Ex parte Parker* (4), although the Court then refused to enforce the transfer for other reasons. At all events, if there is any such power the company have precluded themselves from exercising it by their delay. If the objection had been taken immediately, another transferee might have been found, but this is now impossible.

Mr. *Baggallay*, Q.C., and Mr. *Westlake*, for the official liquidator:—

We admit that a shareholder may transfer his shares to a man of straw; and if the transfer is complete the Court will act on it. But quite independently of the articles there is a certain discretion vested in the directors to refuse a transfer when it may be for the advantage of the company so to do; and when that discretion is properly exercised the Court will not enforce an incomplete transfer against the company, to its damage. Now here the company was in difficulties, and a Petition to wind it up had been presented. A transfer is presented for registration; a false address is given; it does not appear that the transferee is a man of substance; and the transfer is admitted to be made for the purpose of escaping liability. Under these circumstances the Court will not enforce the transfer. As to the long delay, a similar objection was taken in *Shipman's Case* (5), and was overruled.

Mr. *Hill*, for *Birnie*.

Mr. *Roxburgh*, in reply.

June 9. LORD ROMILLY, M.R.:—

This is a summons taken out by a gentleman of the name of *Weston*, asking for the rectification of the register by substituting the name of Mr. *Birnie* for fifty shares. Mr. *Weston* in June, 1866, held eighty-five shares. On the 18th of June he transferred fifty

(1) 30 Beav. 143; 3 D. F. & J. 297.
(2) 4 De G. & J. 544.
(3) 1 D. F. & J. 75.
(4) Law Rep. 2 Ch. 685.
(5) Law Rep. 5 Eq. 219.

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of those shares to Mr. *Birnie*, and executed the transfer, which was accepted by Mr. *Birnie*, and left for registration. It was not registered, and on the 19th of July, 1866, a Petition was presented to wind up the company. On the 22nd of August the transfer was returned, with a statement that the directors declined to register it, upon the ground that the residence of Mr. *Birnie* could not be found. It is quite clear that a false residence was given—I do not impute anything of the character of dishonesty to it—but a residence was given where Mr. *Birnie* was not to be found, and no other residence was given. The question, therefore, that I have to consider is, whether the directors were justified in refusing to register the transfer. I am of opinion that they were. For that purpose I have to consider a question of considerable importance. It frequently happens that in articles of association there is a clause authorizing the directors, of their own will and pleasure, to suspend the registration of transfers, or to refuse it. These articles of association do not contain any such clause; but then it is to be considered, what is the effect of that clause? and I am much disposed to think that the effect of the clause amounts to very little. The directors are the agents of the company. Their duty is to do the best they can for the company. It is quite clear that the directors would not be doing their duty to the company, or doing that which the rest of the shareholders would require, if they were to allow a large number of persons to be put upon the list who could take dividends if there were any to be paid, but who could not pay calls if there were any required. It is obvious that the directors can, within the scope of their authority, do for the company what the company themselves can do in general meeting. I am of opinion that the shareholders might say, "We will not have these shares transferred to a person who cannot take upon himself the burdens of the company, but can only get the advantages to be derived from it." If the company can do that in a general meeting, I am of opinion that it is within the scope of the general authority of the directors, and that they can do it. Even where there is an absolute power in the directors to refuse to register given in the articles, I am of opinion that that is not a purely arbitrary power; and they may not say, because they may have a dislike to a man, "We will not register him." Assume it

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to be a very prosperous company, producing large dividends, and a man, wishing to confer benefit on a relation or friend, sells or gives some of the shares in it to a relation or to a friend, I am of opinion that the directors are not at liberty to say, even though there may be such a clause in the articles of association as that to which I have referred, "We will not transfer these shares, and we refuse out of our own mere will and pleasure;" but they must advance some substantial reason for that purpose. It is a discretion to be exercised reasonably, and I am of opinion that they possess that discretion, and the right to exercise it reasonably, even though it is not expressed in the articles themselves. These clauses, then, are like the clauses for the indemnity and responsibility of trustees introduced into wills and marriage settlements, which add nothing to the safety of trustees not already existing. So here I think that, without such a clause, the directors have a discretion to reject an improper transferee. Then the question arises: Have they in this case reasonably exercised that discretion which was entrusted to them? They knew that the company was in rather a bad state. They might unquestionably, as has been done in some cases, have directed that no further transfers should be registered at all. They could not rest upon that ground in the present case, because they registered a great many transfers after this transfer was submitted to them. But the observation that directors have in many cases claimed a right to register no more transfers in consequence of the state of the company, and that this claim has been allowed by the Court, shews that they have a discretion which entitles them to say, that in some states of the company they will not register any more transfers. That is to say, a discretion is reposed in the directors, whether there is such a clause in the articles of association, or whether there is not, to abstain from registering the transfer of shares.

I do not even now know where Mr. *Birnie's* residence is. That he is a person employed in mining transactions, and other transactions of that description, is, I believe, not only quite established, but also, I have no reason to doubt that he is a perfectly respectable man. But he apparently is not a man of large means, or possessing any facility of being able to pay calls that may be made. The transfer of shares is lodged to be transferred to this

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gentleman at a certain address. The directors send to that address, and they find he is not there. He had been there; it was the house of a friend with whom he had been staying; but where he then was or now is, nobody knows. After some time and certain consideration, they send to the vendor and say, "We refuse to register these shares upon this ground;" and Mr. *Weston* takes no further steps, nor does he tell them anything further. It is true the Petition to wind up had been already presented; but he does not tell them where Mr. *Birnie* was to be found, or that he was a competent person. Mr. *Birnie* appears by his counsel, and no doubt is a perfectly respectable man; but so would be the undergardener or groom of any person who might hold shares and who might wish to transfer them. But how can it be said that if the company is in a failing state, the directors would not be entitled to say, if such a transfer was proposed to be made, "We refuse to register these shares?" I admit that it is a different matter, where, as in *De Pass's Case* (1), there has been no refusal at all, and no discretion has been exercised. But here the only question is whether, in a case where the directors really have exercised a discretion and said, "We conscientiously think these shares ought not to be transferred to this man," I am to interfere and grant what, in point of fact, is in the nature of a mandamus. I am obliged to look at it from this point of view:—Supposing this were a going concern, and this company were now continued to be carried on, but not in very prosperous circumstances, and that I was called upon to rectify the register, and the directors said, "We refuse to register this person's name as a transferee of the shares, because we cannot find out where he lives; we cannot give him any notice, and we will have nothing at all to do with him," should I force them in that state of circumstances to put him on the register? I apprehend I could not; and I am of opinion that I cannot do so now.

Solicitors: Messrs. *Tathams, Curling, & Walls;* Messrs. *Ashurst, Morris, & Co.*

(1) 4 De G. & J. 544.

In re AUDLEY HALL COTTON SPINNING COMPANY.

M. R.
1868
July 4, 6.

Company—Winding-up—Deficient Assets—Costs—Priority—Petitioner and Official Liquidator—Successive Solicitors of Official Liquidator.

In the winding up of a company the Petitioner's costs are the first charge upon the estate, and must be paid in full in priority to the costs of the official liquidator.

Where the official liquidator changes his solicitors, and the assets are not sufficient to pay the whole of his costs, the bills of costs of the successive solicitors will, as a general rule, be paid rateably, so far as the assets will extend, but where the first solicitor gave up documents to the second solicitor upon an undertaking that his costs should be paid out of the estate, his costs were paid in full in priority to those of the second solicitor.

9 Eq. 368
14 Eq. 220

In January, 1865, the *Audley Hall Cotton Spinning Company, Limited,* was ordered to be wound up, and in April, 1865, an official liquidator was appointed, who shortly afterwards appointed Messrs. *Radcliffe,* of *Blackburn,* the solicitors of the Petitioner who had obtained the winding-up order, his solicitors. In July, 1866, the liquidator paid to the creditors a dividend of 12*s.* 6*d.* in the pound, leaving a balance of assets of about £500. In August, 1866, the liquidator discharged Messrs. *Radcliffe,* and appointed Messrs. *Wilkinson,* of *Blackburn,* his solicitors. In November, 1866, he took out a summons against Messrs. *Radcliffe* to compel them to deliver up the file of proceedings and other documents relating to the winding-up. In December, 1866, Messrs. *Radcliffe* delivered up the documents upon receiving a letter from the *London* agent of Messrs. *Wilkinson,* which, in the opinion of the Court, amounted to an undertaking that their costs should be paid out of the estate, and on the 8th of December an order was made by consent on the summons, merely directing that the official liquidator's costs of the summons should be paid out of the estate. These costs were taxed and certified to be £108 6*s.* 4*d.* In January, 1867, an order was made for the taxation and payment of the Petitioner's costs, and of the official liquidator's costs. In March, 1868, the costs were certified as follows:—the Petitioner's costs, £55 14*s.* 10*d.*, the liquidator's costs incurred before the change of solicitors, £206 19*s.*, and his costs incurred after the

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change of solicitors, £116 19*s.* 11*d.* In December, 1866, the liquidator received £100, and in March, 1867, £100, on account of his expenses and remuneration, whereby the assets were reduced to £299 18*s.* 7*d.*

This was a summons by the liquidator that he might apply the £299 18*s.* 7*d.* in payment first of £108 6*s.* 4*d.*, the costs of Messrs. *Wilkinson* under the order of December, 1866, and then rateably towards payment of £262 13*s.* 10*d.* the amount of the costs of Messrs. *Radcliffe* as solicitors for the Petitioner and the official liquidator, and £116 19*s.* 4*d.* the costs of Messrs. *Wilkinson* as solicitors of the official liquidator.

Mr. *Jessel*, Q.C., and Mr. *Cottrell*, for the official liquidator :—

Where the estate of a company is insufficient to pay all the costs of the winding-up, the costs of the official liquidator must be paid first. It is the universal rule in the Court of Chancery that the trustee's costs are the first charge on the estate, and consequently if a creditor institutes an administration suit with notice from the executor that the estate is insolvent, he pays the costs of it. The costs of the assignees in bankruptcy are the first charge on the bankrupt's estate; but the official liquidator is in a higher position than a trustee, or assignee in bankruptcy, for he is the officer of the Court, like a receiver, who does not lose his expenses because the estate is insolvent. Then, as between the successive solicitors of the liquidator, the last solicitor is strictly entitled to be paid in priority to the first: *Cormack* v. *Beisley* (1). But the liquidator proposes that the costs should be paid rateably, except the costs under the order of December, 1866, which must be paid in priority to those ordered to be paid in January, 1867. There was no undertaking to pay Messrs. *Radcliffe's* costs in priority to those of Messrs. *Wilkinson*, and they could not have insisted on retaining the file of proceedings, which are part of the records of the Court, and ought not to have been in their custody.

Mr. *Southgate*, Q.C., and Mr. *Ince*, for Messrs. *Radcliffe*, were not called upon.

(1) 3 De G. & J. 157.

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LORD ROMILLY, M.R.:—

The Petitioner's costs are the first charge. As regards the other costs the question is, whether there was an undertaking that Messrs. *Radcliffe* should be paid; if there was, they are entitled to have the benefit of it. I must read the evidence on that point. I do not think that the order of December, 1866, entitles Messrs. *Wilkinson* to have their costs under it paid in priority to the other costs; at that time it was supposed that there would be a sufficiency of assets, and it was not intended to decide any question of priority.

July 6. LORD ROMILLY, M.R.:—

I have read the papers in this case, and I am of opinion that what took place amounted to an undertaking that Messrs. *Radcliffe's* costs should be paid out of the estate. It is desirable that I should state the rule which I have always adopted in these cases, where the estate of a company is not sufficient to pay all the costs; I have had several of these cases before me in Chambers, but so far as I know this is the first which has been brought before me in Court. I have always held that the Petitioner is entitled to have his costs paid first; he is the person who has brought the matter before the Court, and obtained the order to wind up, and his costs are the first charge on the estate. Then the rest of the costs I treat as the costs of the official liquidator, and he applies them as he thinks proper. But if he comes to me for my direction, where he has employed more than one solicitor, I should say that as between the solicitors the assets should be applied in payment of their costs *pro ratâ*. I do not think that the observations in *Cormack* v. *Beisley* (1) were intended to go beyond the case itself, or that they are inconsistent with this view. But in this case I am of opinion that the new solicitors entered into an undertaking that the costs of the former solicitors should be paid, and therefore they must be paid next after the Petitioner's costs. It is unfortunate that the liquidator has paid a larger dividend to the creditors than the estate warranted, but that does not affect the question, nor does the fact of the liqui-

(1) 3 De G. & J. 157.

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dator having received a sum of money for his services, for which he is entitled to be paid. There will be no costs of this application.

Solicitor for the Applicant: Mr. *Hemsley*, agent for Messrs. *L. & W. Wilkinson, Blackburn.*

Solicitors for the Respondents: Messrs. *Doyle & Edwards*, agents for Messrs. *T. & R. C. Radcliffe, Blackburn.*

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In re MILWARD'S ESTATE.

Leases and Sales of Settled Estates Act—Jurisdiction—Sale of Mines, reserving Rent for Surface damaged by Working.

The Court has jurisdiction under the *Leases and Sales of Settled Estates Act* to order a sale of mines apart from the surface, with rights of using the surface for the workings, reserving a rent in respect of the surface damaged from time to time.

THIS was a Petition by the trustees and *cestuis que trust* of a settled estate under the *Leases and Sales of Settled Estates Act*, that a conditional contract for the sale of the coals under part of the estate, with power for the purchasers to enter upon the surface for the purpose of obtaining, getting, stocking, selling, and disposing of the coal, and of digging and sinking pits and shafts, and of erecting engines and other works, and of making roads and ways, and all such other powers and privileges as are usually granted to lessees of coal (subject to certain restrictions); the purchasers, their heirs and assigns, paying to the vendors a yearly rent for occupied or damaged land at the rate of £5 per acre. The Court made the order as prayed on the 7th of March, 1868, but Mr. *Hayes*, the conveyancing counsel before whom the draft conveyance came to be settled, being of opinion that the Court had no jurisdiction under the Act to authorize the sale of the mines, reserving a rent-charge in respect of the surface damaged from time to time by the workings, the matter was now mentioned to the Court at his suggestion. The purchasers declined to purchase the surface, or to purchase the mines on any other terms, and it was proved that, from the fact of the estate being surrounded by mines belonging to the purchasers, no one else was likely to purchase or work them.

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Mr. *Field*, for the Petitioners:—

The Act authorizes a sale of minerals apart from the surface: *In re Mallin's Settled Estates* (1): and sect. 13 provides that any rights or privileges may be reserved, and the purchaser may be required to enter into any covenant or submit to any restrictions which the Court may deem advisable.

July 22. LORD ROMILLY, M.R.:—

I have considered this matter, and I think that I have power to make the order.

Solicitors: Messrs. *Field, Roscoe, & Co.*

In re VENNER'S SETTLED ESTATES.

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Leases and Sales of Settled Estates Act, s. 36—*Person of unsound Mind not found so by Inquisition—Consent, how given.*

Consent to an application under the *Leases and Sales of Settled Estates Act*, may be given on behalf of a person of unsound mind not found so by inquisition, by a guardian appointed by the Court for the purpose.

THIS was a Petition to authorize a lease under the *Leases and Sales of Settled Estates Act*. One of the persons whose consent was necessary under the 17th section of the Act, being a tenant in tail in remainder, was of unsound mind though not found so by inquisition. A summons had been taken out in the name of the tenant in tail, by his next friend, for the appointment of a guardian of the tenant in tail, for the purpose of consenting to the Petition, and for the leave of the Court for the guardian to consent.

Mr. *Bristowe*, for the Petitioner:—

The 36th section of the Act provides that consents to applications under it may be given by guardians on behalf of infants, and by committees on behalf of lunatics, but does not expressly provide for the case of persons of unsound mind not so found by inquisition. It has, therefore, been thought proper to adopt the same course as in the case of an infant. He referred to *In re Turbutt's Estate* (2); *In re Franklin's Settled Estates* (3).

(1) 3 Giff. 126. (2) 2 New Rep. 158. (3) 7 W. R. 45.

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Mr. *Bradford*, for the next friend, in support of the summons.

LORD ROMILLY, M.R., thought that the proper course had been adopted, and made the orders on the Petition and on the summons.

Solicitors: Messrs. *Ravenscroft & Hills.*

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In re PHILLIPS' TRUSTS.

Lands Clauses Act, s. 74—Leasehold—Tenant for Life and Remainderman—Reference to Expert—Apportionment of Purchase-money.

Where leaseholds settled upon one for life with remainders over had been purchased under the *Lands Clauses Act*, the Court, upon making an order to invest the purchase-money, directed a reference to an actuary to ascertain how much of the capital ought to be paid in each year to the tenant for life.

BY the will of *William Phillips* certain leasehold houses were bequeathed to trustees upon trust for his son, *F. T. Phillips*, for life, with a proviso for forfeiture on bankruptcy or alienation, and after his death or the determination of his interest in trust for his children. The houses had been taken by a local board of health, who had paid the purchase-money, £680, into Court, under the *Lands Clauses Act*. The trustees now presented a Petition praying that the £680 might either be paid to them to be applied as capital under the trusts of the will, or remain in Court and be invested in consols, and the dividends be paid to *F. T. Phillips*.

Mr. *Peck*, for the Petitioners.

Mr. *Everitt*, for the tenant for life:—

There must be some apportionment of the capital, so that the tenant for life may not lose the difference of income between the rents and the dividends. The Court will either arrive at the amount of capital to be paid to the tenant for life yearly, in addition to the dividends, by dividing the capital by the number of years for which the lease has to run, as in *In re Pfleger* (before Vice-Chancellor *Giffard*, June 12, 1868) or will refer it to an

actuary to ascertain the proper proportions, as in *In re Chamberlain* (1).

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LORD ROMILLY, M.R. :—

I think that the proper course will be to refer it to an actuary to ascertain what ought to be paid every year to the tenant for life out of capital and income. The fund may be invested in the names of the trustees, and they must make such annual payments to the tenant for life as shall be certified by the actuary to be proper.

Solicitors for the Petitioners: Messrs. *Prior & Bigg.*

Solicitor for the Tenant for Life: Mr. *Gosling.*

VIBART *v.* VIBART.

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Practice—Revivor—Proceedings taken after Assignment by a Plaintiff.

Where one of two Plaintiffs had assigned his interest after decree, and the Chief Clerk's certificate had been made after the assignment, the common order of revivor was made against the assignee without prejudice to any question whether he was to be bound by the certificate.

IN this suit one of the two Plaintiffs had, after the decree, assigned his interest in the subject matter of the suit, and after the assignment the Chief Clerk had made a certificate without the suit being revived.

Mr. *Waller*, for the other Plaintiff, now asked for the common order of revivor against the assignee, with a proviso that the order should be without prejudice to any question whether the assignee was to be bound by the Chief Clerk's certificate. An order in that form had been made in *Bedborough* v. *Bedborough* (before the Master of the Rolls, July 5, 1866), cited in *Pemberton* on Revivor and Supplement (2).

LORD ROMILLY, M.R., made the order.

Solicitor: Mr. *Tarrant.*

(1) *Morgan's* Chancery Acts, p. 41, note (4th Ed.) (2) Page 151.

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March 17, 18, 20; *April* 23.

MORLAND *v.* COOK.

Purchaser of Land under Sea-level—Liability to contribute to Repair of Sea-wall —Notice—Covenant running with Land—Jurisdiction.

The purchaser of lands situate below the level of the sea is bound to inquire how all walls necessary for the protection of his property against the encroachments of the sea are maintained.

Lands situated below the level of the sea in *Broomhill Level*, *Guildford Level*, and *Walland Marsh*, were, previously to 1794, held in undivided shares. In that year these lands were partitioned by a deed containing a covenant that the expense of keeping and maintaining the walls and gutts of and belonging to the lands thereby divided, should be borne by the owners thereof, and should be payable out of the said lands by an acre-scot:—

Held, that purchasers of parts of the lands in *Guildford Level* and *Walland Marsh*, who had no actual notice of the covenant, were nevertheless bound thereby, and that there was jurisdiction in Equity to deal with the case. Declaration that Defendants were liable to contribute to the repair of a sea-wall along the sea boundary of *Broomhill Level*, with consequential relief, although the Defendants were also liable to contribute to the maintenance of sea-walls along the boundaries of the levels in which their lands were situated.

Semble, that the covenant was one which would run with the land although the assigns of the covenantors were not named.

Pyer v. *Carter* (1) and *Suffield* v. *Brown* (2) commented on.

THIS was a suit instituted by the proprietors of certain lands within the parish of *Broomhill*, in *Romney Marsh*, on the coast of *Sussex* and *Kent*, to compel the Defendants, *Cook* and *Finn* (the proprietors respectively of adjoining lands in *Walland Marsh* and *Guildford Level*, all being in the parish of *Broomhill*) to contribute towards the repair of a sea-wall formed on the southern extremity of the parish to exclude the inroads of the sea.

The lands belonging to the Plaintiffs and Defendants respectively comprising, first, 471A. 3R. 1P., formerly the property of *John Sawbridge*, and secondly, 293 acres, formerly the property of *William Curteis*, were on and before the 24th of December, 1794, held by *William Snoad*, *George Snoad*, *John Snoad*, and *Charles Snoad*, and *John Snoad*, *William Miller*, and *John Woollett* (the devisees in trust of *William Snoad* the younger, then deceased), as

(1) 1 H. & N. 916.

(2) 33 L. J. (Ch.) 249.

tenants in common in fee; *William Snoad* being entitled to one moiety thereof; and *George Snoad, John Snoad, Charles Snoad,* and the devisees of *William Snoad* the younger, being respectively entitled to one-fourth of the remaining moiety.

By virtue of certain indentures of lease and release, the latter dated the 24th of December, 1794, and of fines levied pursuant to covenants therein contained, the whole of these lands were partitioned and allotted in severalty between and unto *William Snoad, George Snoad, John Snoad, Charles Snoad,* and the devisees of *William Snoad* the younger. This partition was apparently made in accordance with an agreement in writing which had been entered into in 1792 between *William Snoad, George Snoad, John Snoad, Charles Snoad* and *William Snoad* the younger. The original agreement was not in evidence in this suit, but it was recited or referred to in the will of *William Snoad* the younger.

The release contained recitals that such part of the lands as was formerly the property of *John Sawbridge* was subject to a perpetual quit rent or fee farm rent of £56 0*s.* 2*d.*, to *Christ's College, Cambridge,* and that such part thereof as was formerly the property of *William Curteis* was subject to a like rent of £51 2*s.* to the Crown or *Christ's College, Cambridge,* or one of them; and these rents were thereby apportioned amongst the lands thereby allotted in severalty, and covenants for giving effect to such apportionment were therein contained. There was also therein contained a covenant in the following terms:—

"And upon the treaty for the said partition and division it was agreed, and now is hereby mutually covenanted, declared, and agreed upon by and between all and every of them the said parties, and they the said *William Snoad, George Snoad,* parties hereto, *John Snoad, Charles Snoad, William Miller,* and *John Woollett,* for themselves, their respective heirs, executors, and administrators, do hereby mutually covenant, promise, and agree, each or every of them, to and with all and every the others and other of them, their and his heirs and assigns, severally and respectively, in manner following, that is to say, that the charges, damages, and expenses of or attending the keeping and maintaining the walls and gutts of or belonging to the said lands, fresh marsh lands, hereditaments and premises hereby granted and released, or intended so

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to be, in good order and repair, shall be borne and paid by them, the said *William Snoad, George Snoad,* parties hereto, *John Snoad, Charles Snoad, William Miller,* and *John Woollett,* respectively, their respective heirs and assigns, out of the said lands and hereditaments hereby divided in proportion, and by an acre-scot to be from time to time for that purpose made thereon, and payable thereout in the same proportions in ready money."

It appeared from the evidence, that a sea-wall was in existence along the southern boundary of the lands comprised in the release of the 24th of December, 1794, at the date of that deed; but it did not appear clearly whether such sea-wall was identical with the present sea-wall; nor could it be clearly made out from the deed in which of the parties thereto the ownership of the wall became thereby vested.

In October, 1829, 167 acres of this property were conveyed to Sir *Edward Knatchbull,* and in 1862 he sold and conveyed 44A. 2R., part thereof, to the Defendant *Cook;* and 96A. 1R. 36P. to the Defendant *Finn.* These sales were made under conditions providing that the title should commence with the conveyance of the 167 acres to Sir *Edward Knatchbull* in 1829, and that no requisition or objection should be made in respect of the anterior title; that the 96A. 1R. 36P. should be subject to the payment of £18 13*s.* 6*d.*, the apportioned part of two fee farm rents of £56 0*s.* 2*d.* and £51 2*s.*, payable to the Crown and *Christ College, Cambridge,* respectively; that the purchasers should not be entitled to require any evidence of the creation or nature thereof, or the title thereto, or to whom the same might be payable; and that the liability of the lands sold to the payment of the whole of the original fee farm rents should not be deemed an objection to the title, nor a subject for compensation or abatement.

The whole of the lands comprised in the deed of December, 1794, were below the level of the sea. The greater part of them were situate in *Broomhill Level;* but part (including the lands sold to *Cook*), were situate in an adjoining level called *Walland Marsh;* and further part (including the lands sold to *Finn*), were situate in another level, called *Guildford Level,* also adjoining *Broomhill Level.* The sea-fronts of *Walland Marsh* and *Guildford Level* continued the sea-front of *Broomhill Level* to the east and

west respectively. They were separated from *Broomhill Level* by an old wall, which had formed the sea-wall before *Broomhill Level* was reclaimed, but which, by the evidence, appeared to be in a state of bad repair, and wholly insufficient to resist the encroachments of the sea, if the wall along the southern boundary of *Broomhill Level* should be destroyed. *Cook's* and *Finn's* lands were situate just within the old wall, and did not anywhere abut on the sea.

Walland Marsh and *Guildford Level* were also protected from the sea by walls erected along their southern boundaries. These walls were formerly maintained under the authority of a royal commission, and more recently under the provisions of the *Land Drainage Act*, 1861. Under this Act it was alleged that *Cook* and *Finn* were liable to rates for the maintenance of the sea-walls of the levels in which their lands were respectively situated; and it appeared that such rates had actually been paid by them.

In 1863 the sea-wall of *Broomhill Level* was repaired, and application was made to *Cook* and *Finn* to contribute a proportion of the expense, in accordance with the covenant in the deed of 1794. They both declined to do so, and thereupon this bill was filed praying:—First: That it might be declared that *Cook* and *Finn* were bound to contribute jointly with all other the proprietors of the lands comprised in the deed of the 24th of December, 1794, out of the said lands, towards the payment of the expenses of keeping and maintaining the walls and gutts belonging to the said lands, in the proportion of the acreage of the lands held by them respectively to the total acreage of the said lands, and for that purpose to pay the acre-scot made from time to time upon the lands so held by them in common with the rest of the said lands, and payable thereout in accordance with the provisions of the said indenture. Secondly: That an account might be taken of the sums payable by *Cook* and *Finn*, and, if necessary, by the Plaintiffs and other Defendants, having regard to the aforesaid declaration, and that payment of the amounts so found due might be decreed.

The principal defence was, that *Cook* and *Finn* were purchasers for value without notice. Evidence was adduced shewing that neither they nor their solicitors had any knowledge or belief that any such claim existed or could be made. In particular, it

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appeared that *Finn* had occupied the lands purchased by him for twenty years, and had never heard of any such claim.

The Plaintiffs sought to fix the Defendants with constructive notice of the deed of 1794, by means of a chain of recitals in the successive deeds and documents of title relating to the property. An outline of the argument on this head is given below; but as the case was decided on other grounds, it is not considered necessary to give a detailed account of the documents referred to.

Mr. *Southgate*, Q.C., and Mr. *Rigby*, for the Plaintiffs:—

The fact that the purchaser was precluded by the conditions of sale from investigating the title prior to 1829 does not entitle him to plead that he had no notice of such prior title; and he must be fixed with constructive notice of everything of which he would have had notice if he had investigated the title in the usual manner: *Robson* v. *Flight* (1); *Parker* v. *Whyte* (2); *Clements* v. *Welles* (3); *Wilson* v. *Hart* (4); *Peto* v. *Hammond* (5); *Chinnery* v. *Evans* (6).

Now, on the face of the conditions of sale it appeared that the lands were subject to an apportioned rent-charge; the purchaser ought to have called for the instrument creating the apportionment, and he would have found that it was the deed of the 24th of September, 1794, of all the provisions of which he must be taken to have been aware.

Again, the conveyance of 1829 to Sir *E. Knatchbull*, recites a deed of 1809 which mentions or refers to a deed of 1808, in which the will of *William Snoad* the younger is recited. That will refers to the agreement for partition. The purchaser would have been bound to inquire how that agreement was carried out, and thus have again been led to the deed of September, 1794.

But, at all events, both purchasers clearly must have known that their land was below the level of the sea, and that but for the protection afforded by the wall in question their land would be under water. Under these circumstances they were bound to

(1) 34 Beav. 110; S. C. on appeal, 5 N. R. 344.
(2) 1 H. & M. 167.
(3) Law Rep. 1 Eq. 200.
(4) Ibid. 1 Ch. 463.
(5) 30 Beav. 495.
(6) 11 H. L. C. 115.

inquire how the wall was kept up. Having notice, the purchasers are bound by the covenant: *Tulk* v. *Moxhay* (1).

But, further, we say that the covenants in the deed of 1794 ran with the land. The wall was in existence at the date of the deed, and it is, therefore, immaterial that the assigns are not named: *Spencer's Case* (2). It is said by the editor of *Smith's* Leading Cases that the burden of the covenant does not run with the land; but Lord *St. Leonards* is of a different opinion (3); and there are decisions to the contrary effect: *Holmes* v. *Buckley* (4); *Brewster* v. *Kitchell* (5); *Coke* v. *Earl of Arundel* (6); *Keppell* v. *Bailey* (7).

It may be said that our remedy was at Law, but it was necessary to come into this Court to ascertain the proportion to be borne by each landowner; and even if there were jurisdiction at Law, there is a concurrent jurisdiction in Equity: *Wright* v. *Hunter* (8).

Mr. *Joshua Williams*, Q.C., and Mr. *J. J. Aston*, for Defendants in the same interest with the Plaintiffs:—

In order that a covenant may run with the land it must be reasonable. The covenant in question is inserted in a deed of partition of lands all situated below the sea level. It is therefore a covenant which has relation to the character of the lands allotted by the deed, and is suitable to be entered into under the circumstances. Moreover, it is in affirmance of a common law liability: *Rex* v. *Commissioners of Sewers for Essex* (9); *Rex* v. *Commissioners of Sewers for Tower Hamlets* (10); *Viner's* Abridgment (11). The covenant, therefore, runs with the land at Law; and as the subject matter of it is eminently for the benefit of the landowner, there is nothing inequitable in holding that it binds a purchaser for value without notice.

Mr. *Jessel*, Q.C., and Mr. *A. E. Miller*, for the Defendant *Finn*:—

To support a bill for contribution the Plaintiffs and Defendants must each be liable to pay the whole of a demand. Here, each is

(1) 2 Ph. 774.
(2) 1 Sm. L. C. p. 45, 6th Ed.
(3) V. & P. 14th Ed. p. 593.
(4) 1 Eq. C. Ab. 27, pl. 4.
(5) 12 Mod. 166; 1 Ld. Raym. 317.
(6) Hardr. 87.
(7) 2 My. & K. 517.
(8) 5 Ves. 792.
(9) 1 B. & C. 477.
(10) 9 Ibid. 517.
(11) Tit. Sewers, vol. xix. p. 421.

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liable to pay his share only, and therefore a Court of Equity will not interfere.

As to the covenant running with the land, the assigns are not named, and the case falls within the latter part of the first resolution in *Spencer's Case* (1). It is not law that the burden of a covenant runs with the land.

No larger rights in respect of this covenant will be given in Equity than would be given at Law. In *Tulk* v. *Moxhay* (2) there was a covenant not to use land in a particular way, and it was held that a purchaser with notice of the covenant could not use the land in violation of the covenant. But it is quite a different case where the covenant is to pay money. It was supposed by Lord *Thurlow* that the equitable assignee of a lease was liable in Equity to pay the rent and perform the covenants in the lease: *Lucas* v. *Commerford* (3); but that notion is now exploded: *Moore* v. *Greg* (4); *Moores* v. *Choat* (5). The present case falls within the principle of these decisions. There is no legal obligation to perform this covenant, and therefore there is no equitable obligation.

The doctrine of constructive notice has been carried very far, and will not be extended: *Ware* v. *Lord Egmont* (6); but it has never been held that a purchaser is bound by every deed which would have appeared in a regular sixty years' abstract of title. Even if we had looked at an abstract of title we should not have been bound to carry our inquiries beyond the deed of 1808, the next preceding document, of which we should have had notice, having been executed more than sixty years ago. But even a sixty years' title would not have given notice of the deed in question, it would only have given us notice of an agreement for partition, which might have been carried into effect by a feoffment with livery of seisin. Notice of the deed would not be notice of any covenants so unusual as these are: *Wilbraham* v. *Livesey* (7): and it is not shewn that the agreement itself contained any such stipulation. As to the apportionment of the rent-charge, there might have been an ancient apportionment.

(1) 1 Sm. L. C. p. 45, 65, 6th Ed.
(2) 2 Ph. 774.
(3) 3 Bro. C. C. 166.
(4) 2 Ph. 717.
(5) 8 Sim. 508.
(6) 4 D. M. & G. 460.
(7) 18 Beav. 206.

The lands bought by *Finn* are not within *Broomhill Level*, and therefore he could have no notice of his liability to contribute to the repair of the wall which protects it from the sea. He might as well be called upon to repair every part of the wall which protects *Romney Marsh*. He was tenant of the lands he bought for twenty years before he purchased them, he never heard of any such claim, he paid regularly his dues to the Commissioners of *Guildford Level*, within which the lands are situated, and it is the duty of these Commissioners to do everything necessary for the protection of these lands. Why, then, should he trouble himself about *Broomhill Level?* As to there being any common law liability, it is laid down in *Callis* on Sewers that in the absence of prescription the owner of the land which adjoins the wall is alone liable to maintain it.

[They also contended that upon the evidence a contribution made in 1846 was purely voluntary, the arrangement made by the deed of partition having been abandoned long prior to that time. They further contended that the allegations in the bill were insufficient to raise the Plaintiffs' case, or to entitle them to relief; but it is not considered necessary to report the arguments or judgment on these points.]

Mr. *Baggallay*, Q.C., and Mr. *G. N. Colt*, for the Defendant *Cook*:—

The passage cited from *Viner's* Abridgment, shews that the law provides for the maintenance of such a wall as this: the only difficulty in this case is occasioned by the proprietors having attempted to do for themselves what the law would do for them. The bill does not rest upon any common law liability; but solely on the covenant in the deed of partition. *Cook* may have had notice of liabilities affecting *Walland Marsh*; but not of those affecting *Broomhill Level*. The covenant does not run with the land; for the burden of a covenant never does. It may be that the Plaintiffs may have claims against the estates of the original covenantors; but they cannot have any against persons who claim these lands under them.

Mr. *Southgate*, in reply:—

The covenant clearly runs with the land. The latter part of

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the first resolution in *Spencer's Case* (1) has been qualified by *Minshull* v. *Oakes* (2). This covenant carries no burden with it; on the contrary, it is a benefit to the whole estate.

We do not rely on any common law liability; all that we say is, that the existence of such a liability ought to have put the purchaser on inquiry.

As to the question of notice, the cases of *Clements* v. *Welles* (3), and *Wilson* v. *Hart* (4), cited in the opening, are exactly in point. *Keppell* v. *Bailey* (5) is doubted by Lord *St. Leonards* (6). *Wilbraham* v. *Livesey* (7) was a case of specific performance between vendor and purchaser; and has nothing to do with the present case.

Apr. 23. LORD ROMILLY, M.R., after briefly stating the facts, continued:—

The first question argued was, whether this covenant binds the land in the hands of the purchaser, although he had no notice of its existence; and for this purpose *Spencer's Case*, and the decisions subsequently made with reference to covenants running with the land, have been discussed and much commented on before me. But, in truth, the case before me in this respect is not exactly touched by any preceding decision.

The case may be put thus:—

The owners in fee simple of five adjoining estates mutually covenant with each other that a certain wall, which is for the common benefit of all, shall from time to time be repaired and maintained at the expense of the owners for the time being of these estates, that the expenses shall be borne rateably, and that the expense of each owner shall be a charge upon and issuing out of his estate.

I think that it is not only a reasonable but a necessary inference from the evidence, that a sea-wall existed at the date of the deed of 1794, and that the covenant in question had reference to the maintenance and repair of that which was then an existing sea-wall.

(1) 1 Sm. L. C. p. 45, 6th Ed.
(2) 2 H. & N. 793.
(3) Law Rep. 1 Eq. 200.
(4) Law Rep. 1 Ch. 463.
(5) 2 My. & K. 517.
(6) V. & P. 14th Ed. p. 400.
(7) 18 Beav. 206.

The cases of covenants running with the land usually arise as between landlord and tenant, which is not the case here, or between vendor on the one side and purchaser on the other side; but the peculiarity of this case is, that every one of the five persons fills the double character of vendor and purchaser, because the original deed is one of partition; and this being once established, it appears to me very doubtful whether the absence of the word "assigns" from the names of the covenantors can make this case obnoxious to the second part of the first resolution in *Spencer's Case* (1), inasmuch as the covenant extends to a thing *in esse*, and which, as far as I can make out, is part of the property conveyed under the deed of partition. At least, I have been unable to make out from the parcels in whom, if not in all, the ownership of the sea-wall (if there be any beneficial ownership in it) is vested. It seems to me that the right to repair and maintain it is given to all the five proprietors in common, and that in case of refusal of the others to concur any one might, without being liable to any action of trespass, enter on the land of the adjoining owner for the purpose of repairing the sea-wall necessary for the protection of the property so conveyed to him under the deed of partition.

However, whether this is exactly correct I have not been able accurately to ascertain—either on examining the parcels contained in the deed of partition or on the evidence. And on this subject, and also as to the existence of the sea-wall itself at the date of the deed itself, I at one time thought that it might be necessary to direct an inquiry, but I have not thought it necessary to do so, for the reasons I am about to state, which are—that independently of the question of the covenant running with the land, I am of opinion that the Defendants had sufficient notice to set them on inquiry as to the manner in which the sea-wall in question was maintained and repaired, and at whose expense. For this purpose a minute examination of the evidence has been necessary, and I state the results which I have arrived at after carefully reading and attending to it. In the first place, I consider it proved beyond all doubt that the wall called the *Walland Sea-wall*, which is the boundary between *Walland Level*

(1) 1 Sm. L. C. p. 45, 6th Ed.

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and *Broomhill Level*, was not at the time when the conveyances were made to the Defendants, in 1862, any protection against the incursion of the sea; that it had not been so for many years; that the sea never approached it; and that, if it had, the wall would not have afforded any protection. It is proved that it is three feet lower than the level of high water at high equinoctial tides, and that even ordinary high tides would pass through it in various places, where roads on a level have been cut through it. The surface of the land of the Defendants lies many feet below the level of the ordinary high tides; and it is plainly shewn that but for the wall the repair of which is in question in this suit, and which lies at the southern extremity of *Broomhill* parish, next to the sea, the lands of the Defendants would be covered every day with the sea. In fact, this is not contradicted by the evidence given on behalf of the Defendants. All that is attempted to be established is, that the *Walland Sea-wall* might be made a protection against the sea, and that, if necessary, it would be the duty of *Walland Level* so to make it.

The case of *Rex* v. *Commissioners of Sewers for Essex* (1) lays down as a proposition of undoubted and unquestionable law that all persons enjoying the benefit of a sea-wall are bound, and are liable at common law, to repair and maintain it in the absence of any special custom, or in the absence of any contract for that purpose. That, in my opinion, establishes this proposition as a necessary consequence, that where a man buys land below the level of high-water, and which would be daily covered by the overflow of sea water were it not prevented by the obstacle of a sea-wall, the purchaser has notice, and is thereby made aware, that by law, unless for some custom or some special contract exempting him, he is liable to contribute to its repair. He cannot in that state of circumstances be allowed to say that he did not know of it. He must be taken to know that his lands are below the sea level. That being so, he must be taken to know that but for the sea-wall they would be overflowed by the tide, and the consequence follows that if he is called upon to contribute towards its maintenance, he must shew how he is exempted, and how the sea-wall is to be maintained without his co-operation.

(1) 1 B. & C. 477.

This principle of the obligation of making inquiry arising from the nature of the property is of constant application in the English law. I may, however, refer to the case of *Pyer* v. *Carter* (1), where the Court of Exchequer held that although the purchaser of a house did not know of a drain at the time of the conveyance to him, yet, as he must have known that the water from the house must drain somewhere, he was put on inquiry, and that those things must be treated as known to him which would have become known to him if a careful examination had been made on the subject by a person conversant with such matters. I am of opinion, therefore, that both *Cook* and *Finn* were, when they were about purchasing these lands, set on inquiry as to how the tidal water was excluded from their land, and that this being accomplished by the *Broomhill Sea-wall*, they were set on inquiry to ascertain how that sea-wall was maintained, and that the burthen of proof lies on them to shew that they are not now bound to contribute.

Both of them fail in this respect. Mr. *Cook* says that he pays wall and water-scot for *Walland Level*, and Mr. *Finn* says he does the same for *Guildford Level*. But it is shewn clearly that the sea-wall in question, which is the wall which protects them both, is not maintained by either *Walland* or *Guildford Level*, but that it is, and has been, maintained and repaired by the proprietors of the lands situate in the parish of *Broomhill*.

When the matter is investigated, it appears that there is no custom appertaining to the subject. It seems that the repairs previously to 1792 were done by the person who was the owner of the land in the parish of *Broomhill*, and that that land became vested in various owners in undivided shares, and that in 1792 these owners of the land agreed to make partition of their lands, which was done in 1794 by a deed in which they entered into a mutual covenant that their lands should be assessed with a wall-scot at so much per acre for the maintenance of the sea-wall in proportion to their holdings.

The Defendants endeavour to avoid this consequence by saying, that if this be so all the inhabitants and landowners of the whole extent of *Romney Marsh* have had the like notice, for that their lands are just as much protected as those of the Defendants by the sea-wall in question.

(1) 1 H. & N. 916.

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Assuming this to be so, the consequence would necessarily follow that every landowner in *Romney Marsh* whose land is protected by this sea-wall was set upon inquiry to ascertain how the sea was kept out, and who paid for the maintenance of the barrier by which the protection was afforded to his property. If in so doing he found that one of the former proprietors of the land which he has acquired had entered into a covenant to pay his proportion of the expense of supporting a sea-wall, and had charged his land with the support of it in common with other persons, then he would be liable to perform that covenant. In the present case, if he had made such inquiry, he would have found that his land was not liable, inasmuch as the burthen was cast exclusively on the proprietors of lands in the parish of *Broomhill*. Whether the Defendants are right in alleging that the Commissioners of *Walland Level*, or those of *Guildford Level*, would, if needful, repair and maintain the sea-wall to which I have already referred, and on which the Defendants rely, it is unnecessary to inquire, inasmuch as it is shewn that they do not repair and maintain it, and that no wall-scot is so applied, and, further, that it would be an idle expense to do so, as the sea tide is kept out by the sea-wall in *Broomhill*, and never approaches the base of the *Walland* wall.

It may be true unquestionably, though the fact is not very clearly proved, that the Defendant Mr. *Cook* may have to pay wall-scot to *Walland Level*, and that the Defendant Mr. *Finn* may have to pay wall-scot to the *Guildford Level*, but, if so, it must be because they derive protection from another sea-wall, or other parts of the sea-wall than that which is the subject of this covenant. This, no doubt, is highly probable. It may be from that part of the *Walland Sea-wall* which continues the *Broomhill Sea-wall* to the east, or from that part of the *Guildford Sea-wall* which continues the *Broomhill Sea-wall* on the west, both of which probably afford protection to all the inhabitants and proprietors within the *Romney Marsh*, and both of which must be maintained and repaired out of the lands appropriated for that purpose, or made subject to that burthen; but this will not exonerate the Defendants from paying their fair proportion for the protection afforded by the *Broomhill Sea-wall*, if I am right in coming to the

the conclusion at which I have arrived, viz., that they were, on acquiring their property, set on inquiry as to how this wall was maintained and repaired, and that such inquiry would forthwith have given them notice of the covenant by the proprietors under whom they claim for contribution in respect of their lands.

It is proper, however, that before I part with this portion of the case that I should refer to *Suffield* v. *Brown* (1), where I acted on this principle, and followed the case of *Pyer* v. *Carter* (2); but, on appeal, Lord *Westbury* reversed my decision, stating that he considered that *Pyer* v. *Carter* was a case of little or no authority (5). Previously to that time I had known *Pyer* v. *Carter* questioned, and I had also thought that that case only stated and recognised a principle, both of Law and of Equity, followed in many cases, and stated and acted upon by Lord *Ellenborough* in *Rex* v. *Commissioners of Sewers for Essex* (3). This principle seems to me to be shewn in many matters which are familiar to all persons in dealing with legal matters: *e.g.*, if a man buys property with a piece of land in the midst of it not included in the purchase, he has notice that the owner of that piece of land has a right of access to it, although the mode of access does not appear. After much deliberation, I have thought it best, in what appears to me a considerable accumulation of authorities against the view propounded by Lord *Westbury*, to act on what I consider to be the fundamental principle of Equity, in order that my opinion might be corrected, and this matter, which is one of great importance, might be finally settled by the highest authority.

I concur entirely with the observations of Lord *Cottenham* in *Tulk* v. *Moxhay* (4). I am of opinion that the right in Equity does not depend upon whether the right could be enforced at Law, and that when a man acquires property, with notice that the person under whom he claims has entered into a mutual covenant with the adjoining owner or owners that the property shall not be used in a particular manner, or that it shall contribute to the support of a common protection, he cannot afterwards dispute his liability to perform the condition imposed by the previous owner.

I am unable to understand the distinction endeavoured to be drawn

(1) 33 L. J. (Ch.) 249. (3) 1 B. & C. 477.
(2) 1 H. & N. 916. (4) 2 Ph. 774.
(5) 10 Jur. N. S. 1111; 2 L. C. (11 C. B. N. S.) 185.

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between *Tulk* v. *Moxhay* (1) and the present case, on the ground that in that case the covenant was, that the proprietor should not use the land in a particular manner, and that here the covenant is, that the proprietor shall contribute his quota to a common benefit. In my opinion there is no distinction between the two cases. If there be, it is in the favour of the Plaintiffs' contention, for in *Tulk* v. *Moxhay* it was simply a burthen imposed on the land without any corresponding advantage; here it is a burthen imposed on the land by means of which the proprietor obtains the assistance of the adjoining owners to concur with him in doing that without which his land could not be enjoyed at all.

Having come to this conclusion, it is unnecessary for me to inquire whether the Defendants are to be held as having had constructive notice of the deeds which would have been disclosed to them in case they had required the ordinary sixty years' title. Had they done so, it is clear that they would have known of the will of *William Snoad*, and of the agreement for partition of 1792, and of the fact that partition had taken place under it in 1794; and it is difficult to understand how any man can gain an advantage by abstaining from inquiring for, or by refusing to look at deeds which, in the ordinary course of business, a prudent purchaser would ask for and examine. But I do not, on the present occasion, mean to put the case higher than I did in the case of *Peto* v. *Hammond* (2), which, on reconsideration, I approve of.

It is insisted by the Defendants that this is not a case for Equity, but a case in which the liability ought to be enforced by action at law; but I have already noticed this point in referring to the case of *Tulk* v. *Moxhay*, and I repeat my opinion that, if there were no remedy at law, this right is one proper to be enforced in Equity; but, in truth, it is strictly and properly a case for Equity, which is resorted to in order to obtain a declaration of the right of the adjoining landowners in *Broomhill* parish to make the owners of the lands included in the covenant of 1794 contribute their proper quota for the support of the wall. What that share or proportion may be is not the question now. The Defendants clearly are not bound by the outlay already made, and they are entitled to an

(1) 2 Ph. 774. (2) 30 Beav. 495.

inquiry in Chambers to ascertain what is the proper amount to be paid by them respectively.

[His Lordship then stated his reasons for considering that the covenant had not been abandoned, and continued:—]

The grounds on which I proceed are shortly stated thus:—I think the sea-wall was in existence at the date of the deed of 1794, and that consequently this case comes within the first resolution in *Spencer's Case* (1); in other words, that the covenant of the deed of 1794, that the expenses of maintaining the walls belonging to the lands in good order and repair should be borne by the five persons there named respectively, their respective heirs and assigns, out of the said lands, in proportion to and by an acre-scot, to be from time to time made, and payable thereout in ready money, was a covenant which extended to a thing *in esse*, the thing to be done by force of the covenant being annexed and appurtenant to the land partitioned and conveyed, which goes with the land, and binds the assignee, although he be not mentioned by express words.

But even if this were not so, I am of opinion, that it being manifest to each of the Defendants when he bought this land that it was protected by the sea-wall in question, he was bound to inquire by whom that sea-wall was maintained, and that therefore he must be held to have had notice of all that he would have learned if he had made such inquiry, and that as by so inquiring he would have ascertained the existence of this covenant, he cannot now repudiate it, or refuse to perform the condition which affected the ownership of the land in the hands of the person from whom he bought. I think also, on the ground of the case, *Rex* v. *Commissioners of Sewers of Essex* (2), already cited, that, as the Defendants are protected by this sea-wall, they are liable at common law to contribute to the support of it unless they prove that they are not so liable, and that they fail in proof of exonerating themselves from this common law liability. I am of opinion, therefore, that the Plaintiffs are entitled to a decree in the terms of the two first paragraphs of the prayer of the bill, and that the two Defendants, *Cook* and *Finn*, must pay the costs of the suit, by which I mean the costs of the Plaintiffs, together with the costs

(1) 1 Sm. L. C. p. 45, 6th Ed. (2) 1 B. & C. 477.

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of the other Defendants, which the Plaintiffs must pay, and add to their own costs.

Solicitor for the Plaintiffs, and Defendants in the same interest: Mr. *F. T. Aston.*

Solicitors for the Defendant *Cook:* Messrs. *Kingsford & Dorman.*

Solicitors for the Defendant *Finn:* Messrs. *Duncan & Murton.*

M. R. 1868 — *July 7.*

LANDELL *v.* BAKER.

*Partition Suit—Sale—Costs—*31 & 32 *Vict. c.* 40.

The Act 31 & 32 Vict. c. 40, has not altered the practice of the Court with respect to the costs of a partition suit.

Where, therefore, at the hearing of a partition suit a sale was ordered under the provisions of that Act:—

Held, nevertheless, that each party must pay his own costs up to the hearing.

THIS was the hearing of a suit for partition; and a decree for sale was made under the provisions of the Act 31 & 32 Vict. c. 40.

Mr. *Graham Hastings*, for the Plaintiff, asked for the direction of the Court as to how the costs ought to be borne, and referred to *Osborn* v. *Osborn* (1), where Vice-Chancellor *Malins* gave the costs of all parties out of the estate.

Mr. *Southgate*, Q.C., Mr. *Peck*, and Mr. *B. B. Rogers*, for the Defendants.

LORD ROMILLY, M.R.:—

I do not think that the Act was intended to alter the practice of the Court with respect to costs; and each party must therefore bear his own costs up to the hearing.

Solicitors: Mr. *Vining*; Messrs. *Whittakers & Woolbert*; Messrs. *Dyne & Harvey.*

(1) Law Rep. 6 Eq. 338.

CAMPBELL *v.* BAINBRIDGE.

V.-C. S.
1868
June 24, 26, 27.

Marriage Settlement—Covenant to settle future Property—Separate Use.

In a marriage settlement it was declared, and the husband covenanted, that in case at any time during the coverture any real, personal, or mixed estate of the value of £500 should come to or vest in the wife, or the husband in her right, at law or in equity, by devise, descent, gift, or otherwise, it should be conveyed and assigned from time to time without delay by the husband, his executors and administrators, and the wife upon the trusts of the settlement:—

Held, that a legacy given to the separate use of the wife was within the covenant.

THIS was a motion to vary the Chief Clerk's certificate made in pursuance of the decree of the 12th of February, 1868, whereby the Chief Clerk certified "that the legacy of £5000 given by the will of *Anne Bainbridge* to *Grace E. Campbell* for her separate use never became in any manner subject to the covenant on the part of Sir *J. N. Campbell* contained in the settlement."

By an indenture, dated the 22nd of March, 1828, being the marriage settlement of Sir *J. N. R. Campbell* and *Grace E. Bainbridge*, a sum of £10,000 was settled, and several clauses followed, which were prefaced by the words, "And it is hereby agreed and declared by and between the said parties to these presents," and then followed a covenant in these terms:—

"And it is hereby further declared and agreed, and the said Sir *J. N. R. Campbell* for himself, his heirs, executors, and administrators, doth covenant, promise, and agree with the said trustees, their heirs, executors, and administrators, and every of them, that in case, and at any time or times hereafter during the intended coverture between the said Sir *J. N. R. Campbell* and *G. E. Bainbridge*, any real, personal, or mixed estate and effects, amounting at any one time to the value of £500, shall come to or vest in the said *G. E. Bainbridge*, or the said Sir *J. N. R. Campbell* in her right, at law or in equity, by devise, descent, gift, or otherwise, that the same shall be conveyed and assigned from time to time without delay by the said Sir *J. N. R. Campbell*, his executors and administrators, and the said *G. E. Bainbridge*, unto and to the

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use of the said trustees, their heirs, executors, and administrators respectively, according to the quality of such estate, upon the trusts of these presents."

The marriage took effect. There were two children, the Plaintiff and his sister. In January, 1835, Lady *Campbell's* mother died, having left her by will £5000 to her separate use. It appeared from the evidence that the two acting trustees purchased with the £5000, *Ohio* bonds in the joint names of *Campbell* and his wife, but there was nothing to shew that Lady *Campbell* had given any directions to the trustees to do so, nor was her receipt for the money forthcoming. She died in December, 1863. Sir *J. N. R. Campbell* had sold the bonds, and applied the proceeds to his own use. In June, 1865, the Plaintiff filed his bill to administer the trusts of the settlement, and, on the answers being filed, he amended his bill by praying that the trustees might be decreed to make good the sum of £5000.

Mr. *Hardy*, Q.C., and Mr. *J. Napier Higgins*, for the Plaintiff:—

There are two distinct covenants, one by the intended husband, the other by the intended wife. The wife covenants as to any property which may vest in her apart from and independently of her husband, and he covenants as to any property which may come to him by or through his wife. The covenant by the husband is in technical language; that by the wife is in form an agreement and declaration, but, being an agreement under seal, is as effectually a covenant as that of the husband: *Hollis* v. *Carr* (1); *Monypenny* v. *Monypenny* (2); *Isaacson* v. *Harwood* (3).

The covenant of the wife affects and binds the legacy of £5000 given to her separate use. The mere covenant by the intended husband would not affect property given to the separate use of the wife: *Douglas* v. *Congreve* (4); *Thornton* v. *Bright* (5); *Travers* v. *Travers* (6): but the covenant by the intended wife will bind property afterwards given to her absolutely to her separate use: *Butcher* v. *Butcher* (7); *Willoughby* v. *Middleton* (8); *In re Main-*

(1) 2 Freem. 3.
(2) 3 De G. & J. 572-587.
(3) Law Rep. 3 Ch. 225.
(4) 1 Keen, 410.
(5) 2 My. & Cr. 230.
(6) 2 Beav. 179.
(7) 14 Ibid. 222.
(8) 2 J. & H. 344.

waring's Settlement (1): and this doctrine has been recognised by the Master of the Rolls in *Milford* v. *Peile* (2); *Hammond* v. *Hammond* (3); *Young* v. *Smith* (4). The testatrix might have provided, as in *In re Mainwaring's Settlement*, that the fund should not be subject to the trusts of the settlement, nor subject to any prior engagement on the part of the wife, but nothing of the kind was attempted.

The decisions in *Reid* v. *Kenrick* (5), and *Grey* v. *Stuart* (6), are not in conflict with the view now presented, and the reasoning of Vice-Chancellor *Kindersley* in his judgment in *Ramsden* v. *Smith* (7) strongly supports it.

Mr. *Loughborough*, for parties in the same interest.

Mr. *Bacon*, Q.C., and Mr. *Archibald Smith*, for the acting trustees:—

This is a mere question of construction, and the only question is, whether the wife has bound herself. Suppose the words "it is hereby declared and agreed" were omitted, it could not be contended for a moment that the wife was bound, but the words are merely introductory of the covenant that follows, and there is here no covenant by the wife. These words occur several times in the settlement, but in all but two instances the words "by and between the parties" follow them. Those words do not occur in this clause. It is quite clear that if there is no covenant by the wife, though she is to do the act, she would not be bound. Her husband's covenant would not bind her. The fair construction of the language is, that all parties agree that the husband shall covenant to settle.

Mr. *Greene*, Q.C., appeared for a trustee, Sir *E. May*, who had not concurred in the act impugned, but took no part in the argument.

Mr. *Karslake*, Q.C., and Mr. *Lawrance*, for mortgagees of the life estate of the husband:—

There is here no covenant by the wife. The words "it is hereby

(1) Law Rep. 2 Eq. 487.
(2) 17 Beav. 602.
(3) 19 Ibid. 29-32.
(4) Law Rep. 1 Eq. 180.
(5) 1 Jur. (N. S.) 897; 3 W. R. 530.
(6) 2 Giff. 398.
(7) 2 Drew. 298.

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declared and agreed," mean no more than that the husband should covenant in the manner prescribed. The effect of the decisions is, that there must be a covenant by the wife, or a necessary implication from the settlement, that the property is to be settled: *Brooks* v. *Keith* (1); *Coventry* v. *Coventry* (2). One of the latest cases—*Young* v. *Smith* (3)—shews that if the covenant is omitted the mere recital is not enough.

Mr. *Hardy*, in reply:—

The only case that conflicts with the authorities which shew that these words bind the wife is *Brooks* v. *Keith*; but there the distinction taken in the report was inconsistent with the case. Neither *Butcher* v. *Butcher* (4) nor *Ramsden* v. *Smith* (5) were cited in that case.

[*Ewart* v. *Ewart* (6) was also cited.]

SIR JOHN STUART, V.C.:—

The question is one of considerable difficulty. A legacy of £5000 was clearly given to the separate use of the wife, free from the debts and control of her husband, so that her receipt alone should be a good discharge. It was so given that she had an absolute power over it, and could bind it by covenant or agreement, or even, according to the law as it now stands, by promissory note. The first question is, whether this legacy is such property as is contemplated by, and would be included in, the clause in her marriage settlement. The next question is whether she has bound it by any contract or engagement of her own. If she has, it is beyond a doubt that she was competent to bind it, and that the property is bound by the trusts of the settlement. As to the first question, it has been argued from the context in the settlement, that no other property was contemplated by the clause in question, but such as should come to the husband *jure mariti*. But it seems to me, looking accurately at the language, that it is impossible so to restrict it; the clause applies in terms to any real, personal, or mixed estate and effects which shall come to, or vest in, the said *Grace Elizabeth Bainbridge*, or in

(1) 1 Dr. & Sm. 462.
(2) 32 Beav. 612.
(3) Law Rep. 1 Eq. 180.
(4) 14 Beav. 222.
(5) 2 Drew. 298.
(6) 11 Hare, 276-285.

Campbell, her husband, in her right. I think it is impossible to restrict these words to property coming to him in right of his wife, or to property which, being given to the wife, should become his *jure mariti*. Therefore I think it is clear that the clause includes property given to her for her sole and separate use, so as that she has power of disposition over it, unfettered by any clause prohibiting alienation. If that be so, the next question is, whether the language of the clause contains any contract or agreement by her which binds that property. The property is such that clearly her husband's covenant could not affect it.

As to the criticism upon the words "it is hereby further declared and agreed," preceding a covenant which is the covenant of the husband alone, it seems to me very clear, and was so expressed by Vice-Chancellor *Kindersley*, that where the covenant is by the husband alone, the words previously inserted, that "it is hereby declared and agreed," amount only to a declaration and agreement that all parties are agreed that the husband shall covenant. But where it is declared and agreed—that is, by all the parties, including the wife—that property which may come to her for her separate use, free from the control of her husband, shall be settled, the case is clear. That seems to me the meaning of the language of the clause. I cannot read the words of this clause without seeing that her separate property and her separate agreement are a substantial and integral part of this clause, and that it is an agreement by all the parties, including the wife, that the wife should do something, for it is agreed and declared that if this property should come to or vest in either of them, the intended husband and wife, the same shall be conveyed and assigned without delay by the husband and the wife. It is said that in the case of *Ramsden* v. *Smith* (1) the words are identical, but they certainly are not. Vice-Chancellor *Kindersley* in that case rested his judgment upon this, that the person who alone, according to the terms of the clause, was to do anything was the husband. But that is not the case by the terms of this clause, because the wife is as much bound to do something as the husband. If that be so, she had a power clearly to bind this property as property settled to her separate use without any fetter or control over her. In that view

(1) 2 Drew. 298.

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of the case I must hold that this property is bound by an engagement on the part of the wife which brings it within the operation of the settlement, and subjects it to the trusts therein contained.

The other branch of the case is very important, it is this: that suppose there was nothing to bind the wife in the terms of the settlement, inasmuch as the husband is clearly bound, and is bound to settle all property that he acquires in her right, if it is found that she in her absolute control of the property puts it immediately and at once under the joint power of him and herself, that rather seems to be property acquired by him within the language of the settlement, for it is not easy to say that it is not property which came to and vested in *Grace Elizabeth* or her husband in her right at law or in equity, by devise, descent, gift, or otherwise. So that upon either view of the case it seems to me that this property is subject to the trusts of the settlement, and it is greatly to be regretted that the property should have disappeared under circumstances which make it the duty of the Court to declare now that it must be restored. The decree must go against the husband and against the two trustees who acted at the time, but not against Sir *E. May*. There will be a declaration that the sum of £5000 was subject to the trusts of the settlement, and an order that Sir *John Campbell* and the two acting trustees pay the same into Court. The trustees to have their costs of administering the trusts of the settlement, but to pay the costs occasioned by their breach of trust.

Solicitor for the Plaintiff, and parties in the same Interest: Mr. *Thomas Loughborough*.

Solicitors for the Defendants: Messrs. *Boys & Tweedies*.

BROMLEY *v.* BRUNTON.

V.-C. S.
1868
June 23, 24.

Gift inter vivos—Refusal of Bankers to pay Cheque—Death of Donor.

A cheque was given by *A.* to *B.*, and presented without delay. The bankers had sufficient assets of *A.*, but refused payment because they doubted the signature. The next day *A.* died, the cheque not having been paid:—
Held, a complete gift, *inter vivos*, of the amount of the cheque.

THE bill in this cause was filed for the administration of the trusts of the will of *Hannah Mary Ann Chantry*, and under the decree the Chief Clerk certified that *Mary Ann Bromley*, who was not a party to the suit, claimed a sum of £200 to be due to her from the estate of the testatrix, with interest at £4 per cent. from the date of the decree, and that the evidence in support of the claim was, that on the 14th of February, 1867, the testatrix gave *M. A. Bromley*, by way of gift, a cheque for £200 signed by her on her bankers—the *London and County Bank, Oxford Street* branch—payable to *M. Bromley* or bearer; that on the 15th of the same month the cheque was presented for payment, but was refused on the ground that the signature differed from the usual signature of the testatrix; that on the 15th, £170 was paid in to the account of the testatrix, whereby there were sufficient assets for the payment of the cheque; that on the 16th the cheque was again presented at the bank, and was again refused for the reason above alleged, and that the testatrix died on the 17th of the same month without the cheque having been paid. It was submitted to the Court whether the claim should be allowed. The evidence shewed that the claimant was a granddaughter, who had resided with the testatrix for about three years previously and up to the time of her death, and had attended upon her personally during her last illness; that the testatrix was perfectly conscious of what she was doing when she signed the cheque, the body of which was written by the claimant; that she told the claimant it was a gift; tha there was just money enough in the bank to cover the cheque; and that the testatrix, when she handed the cheque to the claimant, said she thought it would be useful to her, and should anything happen to her (the testatrix) she would be able to do something

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with the money and not be compelled to go home, where she knew the presence of a married sister of the claimant was not agreeable to her and interfered with her comfort.

The cheque was signed *Hannah Chant*, but "*Chant*" being written very badly the testatrix wrote *Chantry* underneath, and hence the refusal on the part of the bank to pay the money.

The evidence of the claimant was confirmed by the affidavits of several deponents.

Mr. *Greene*, Q.C., and Mr. *Renshaw*, for the Plaintiffs.

Mr. *Fischer*, for the Defendants, the executors.

Mr. *Bagshawe* for *M. A. Bromley*, submitted that everything was done by the testatrix and by the donee of the cheque to make this a good gift *inter vivos*. The cheque was presented in due time at the bank, where there were sufficient funds, and it ought to have been cashed. The claimant ought not to suffer through a neglect of duty or wrongful act on the part of the bankers.

Mr. *Everitt*, for residuary legatees, infants, contended that there was no perfect gift *inter vivos*. It was a voluntary gift, which could not have been enforced against the testatrix if she were living, and being incomplete it could not now be enforced against her executors: *Edwards* v. *Jones* (1).

The gift could not be considered as a *donatio mortis causâ*, nor could it be supported as a declaration of trust: *Jones* v. *Lock* (2); *Coningham* v. *Plunkett* (3).

[The VICE-CHANCELLOR referred to *Kiddill* v. *Farnell* (4) and Mr. *Hallett*, as *amicus curiæ*, to *Cross* v. *Sprigg* (5).]

There was not a complete legal obligation. The claimant could not have successfully sued the executors at law, and a Court of Equity ought not to afford any relief.

[The following authorities were also cited: *Foley* v. *Hill* (6); *Tate* v. *Hilbert* (7); *Fletcher* v. *Fletcher* (8); *Bridge* v. *Bridge* (9);

(1) 1 My. & Cr. 226.
(2) Law Rep. 1 Ch. 25.
(3) 2 Y. & C. Ch. 245.
(4) 3 Sm. & Giff. 428.
(5) 6 Hare, 552.
(6) 2 H. L. C. 28.
(7) 2 Ves. 111.
(8) 4 Hare, 67.
(9) 16 Beav. 315.

Beech v. *Keep* (1); *Tate* v. *Leithead* (2); *Hewitt* v. *Kaye* (3); *Bouts* v. *Ellis* (4); *Woodford* v. *Charnley* (5); *Lawson* v. *Lawson* (6); *Ex parte Pye* (7); *Byles* on Bills (8); and *Williams* on Executors (9).]

SIR JOHN STUART, V.C.:—

In order to make a gift of this description valid it is necessary, according to the settled doctrine of the Court, that it should be complete—that everything should be done on the part of the donor. The gift in this case being made in the form of a cheque drawn on the bankers of the donor, if there had been no funds in the hands of the bankers then of course there would have been an incompleteness in the gift on the part of the donor. It is clear, however, that when the cheque was presented on the second occasion the bankers had sufficient funds in their hands to pay it. The reason why they did not pay it was one proceeding from their minds—they doubted the authenticity of the donor's signature, and the result is that the funds which the donor had dedicated to the purpose of this gift, through no act of the donor, and through no default of the donee, came into the hands of the executors of the donor. I conceive that, under these circumstances, no further act was necessary on the part of the donor to make the gift complete. The failure, so far as the gift has failed through non-payment to this time, occurred through the default of third parties, whose duty it was to pay it. The effect of the cheque was to appropriate so much of the donor's money, and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the bankers. It was said that *Tate* v. *Leithead* is an authority in favour of the executors refusing to pay this cheque; but in that case the cheque was never presented to the bankers, while here the cheque was presented on two occasions, and the failure in the receipt of the money by the

(1) 18 Beav. 285. 18 Jur 971
(2) Kay, 658.
(3) Law Rep. 6 Eq. 198.
(4) 17 Beav. 121; 4 D. M. & G. 249. 17 Jur 405, 505
(5) 28 Beav. 96.
(6) 1 P. Wms. 441.
(7) 18 Ves. 140.
(8) 9th Ed. p. 120.
(9) 5th Ed. p. 1603.

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donee is not attributable to her but to the conduct of the bankers. I am of opinion that the gift was as complete as the donor and the donee could make it, and, consequently, that the cheque must be paid out of the funds in the hands of the executors, with interest, as claimed.

Solicitors: Messrs. *Walters & Gush;* Mr. *J. Edwin Carter;* Mr. *H. M. Phillips.*

V.-C. S. 1868 *July* 9.

CLIFTON *v.* GOODBUN.

Will—Illegitimate Children—Bequest by a Spinster to her Children.

A testatrix, who was never married, describing herself as a spinster, bequeathed her property in trust for her children. She had four illegitimate children at the date of the will, three of whom and an after-born child were living at her death, and in a codicil she described her children by name:—

Held, that the children, and not the next of kin of the testatrix, were entitled to her property.

6 Ch. 313, 6 H.L. 272, 9 Ch. 150

SPECIAL CASE. *Jane Goodbun*, described in her will as of *Doghurst, Harlington, Middlesex*, spinster, who died on the 7th of July, 1865, by will, dated the 26th of January, 1858, gave, devised, and bequeathed unto the two Plaintiffs all her real and personal estate to their use, upon trusts to convert and, after payment of debts and costs, to invest as in the will directed, and to pay the income unto her mother, *Harriet Goodbun*, for life, and after her death to stand possessed of the funds and securities upon trust "for and to be equally divided between and among all my children when and as they shall respectively attain the age of twenty-one years, at which time they shall respectively acquire vested interests, subject, nevertheless, to the life interest of my said mother therein."

The trustees were empowered, but with the consent of the testatrix's mother, if competent, to apply the whole or any part of the income towards the maintenance, education, and support "of my children, or any of them," and to apply, with the like consent, the whole or part of the capital towards the advancement "of my children, or any of them." The testatrix appointed the Plaintiffs

executors of her will, and also appointed one of them, viz., *Thomas Henry Clifton*, guardian of the persons of such of her children as at the time of her decease should be under the age of twenty-one years. By a codicil, prepared by a notary at *Boulogne*, in the French language, in April, 1865, the testatrix gave and bequeathed "in entire property and enjoyment to enjoy and dispose of from the date of my decease jointly amongst themselves, to, first, *W. H. Goodbun*, second, *J. P. Goodbun*, third, *H. Goodbun*, fourth, *J. L. Goodbun*, my children, living at *Doghurst* . . . the dwelling house and appurtenances which I possess at *Boulogne*. . . . I give them also jointly amongst themselves all the furniture which shall be found in that house. In case one or more of my said legatees shall happen to die during my lifetime without children or descendant, their share shall accrue to their co-legatees." Both documents were proved by the said *Thomas Henry Clifton*. The testatrix was never married. At the time when she executed her will she was the mother of four children, bearing her name, and baptized as the sons of *Jane Goodbun*. Of those four children, *Archibald Goodbun* died in March, 1863, an infant, and between the dates of the will and codicil, viz., on the 2nd of December, 1863, the above-named *J. L. Goodbun* was born. The testatrix left her surviving her mother, a sister, and a niece, her only next of kin.

The questions were:—first, whether, under the circumstances, the Plaintiffs might cause to be transferred into the name of the Defendant, *Harriet Goodbun*, her share of the personal estate bequeathed by the will and codicil of the testatrix, as one of the next of kin of *Jane Goodbun* if she had died intestate? and, secondly, out of what fund the costs of the special case should be paid?

Mr. *Graham Hastings*, for the Plaintiffs.

Mr. *M. Cookson* (Mr. *Bacon*, Q.C., with him), for the Defendant, *W. H. Goodbun*:—

There is no distinct authority upon the question raised in this case, but upon the cases of *Pratt* v. *Mathew* (1), and *Howarth* v. *Mills* (2), we submit that a single woman, the mother of illegiti-

(1) 22 Beav. 328. 2 Jur. N S 364 (2) Law Rep. 2 Eq. 389.

V.-C. S. 1868 CLIFTON v. GOODBUN.

mate children, can make by will a valid gift of her property to persons described as "my children." In *Pratt* v. *Mathew*, the Master of the Rolls said (1), "it is also clear that illegitimate children cannot take under a gift to children, unless it be quite clear on the face of the gift that legitimate children never could have taken under the gift;" and in *Howarth* v. *Mills* (2), where the gift was by a mother "to my children, legitimate or otherwise,"—to two classes of children—Sir *W. Page Wood*, though he did not doubt the intention was to provide for the illegitimate children, regretted the gift could not be carried into effect. Here the gift by will is clear on the face of it, but if there were any doubt on the will, the codicil, which describes the children *nominatim*, would remove it. We contend that there is no intestacy, and that all the children now living are entitled to take.

Mr. *Dickinson*, Q.C., and Mr. *W. C. Druce*, for the Defendants the next of kin:—

In *In re Overhill's Trust* (3) it was said, "where there is a gift to children as a class, then, unless there are words so clear as necessarily to apply to and include illegitimate children, or clearly to exclude any but such children . . . . the description would include legitimate children only." In that case the gift was not by a mother, but by a third party, and it was held that the illegitimate children were not entitled. Though the gift in this case is by the mother, the same reasoning applies. The intention as to who are to be included must appear upon the face of the will. These children are not, in the will, referred to by name, and there was no reason why the mother should not have had legitimate children.

[*Bagley* v. *Mollard* (4), and *Dover* v. *Alexander* (5), were also cited.]

SIR JOHN STUART, V.C.:—

The testatrix describes herself as a single woman; therefore the gift by her will to her children is a gift to her illegitimate children. This appears upon the face of that document, and looking at the codicil it is impossible to doubt who were the objects of this

(1) 22 Beav. p. 339. (3) 1 Sm. & Giff. 362, 366.
(2) Law Rep. 2 Eq. 389. (4) 1 Russ. & My. 581.
(5) 2 Hare, 275.

gift. Lord *Eldon*, in the case of *Wilkinson* v. *Adam* (1), said, "in all the cases that I have seen having relation to this question, the illegitimate children, if they were to take, must have taken, not by any demonstration arising out of the will itself, but, by the effect of evidence *dehors*, read, or attempted to be read, with a view to establish, not out of the contents of the will, but by something extrinsic, who were intended to be the devisees." And, again, in the same case, Lord *Eldon* said (2): "Where an unmarried man describing an unmarried woman as dearly beloved by him, does no more than making a provision for her and children, he must be considered as intending legitimate children; as there is not enough upon the will itself to shew that he meant illegitimate children, and my opinion is that such intention must appear by necessary implication upon the will itself." In this case no implication is necessary, for it is clear upon the face of the will that she means illegitimate children. Lord *Eldon*, speaking of legitimate and illegitimate children taking together as a class under a gift to children, said (3), "it would be very difficult to persuade me that they can, but if my opinion is right, that upon the contents of this will the testator is proved to have intended illegitimate children, that question never could have arisen; as then, though the devise is to illegitimate children, marriage, and the birth of legitimate children, would have the same effect as upon a devise to any stranger." This testatrix was never married. If the testatrix had married the gifts by this will would have been revoked, and no legitimate child could have taken under this will. In my opinion the illegitimate children are entitled under this will. The answer, therefore, to the first question must be in the negative, the Court being of opinion that all the children who survived their mother take under the will; and as to costs there will be no order.

Solicitors: Mr. *George Carew;* Mr. *H. G. Carew.*

(1) 1 V. & B. p. 462. (2) 1 V. & B. p. 465.
(3) 1 V. & B. p. 468.

V.-C. M.
1868
June 29, 30; July 1, 29.

ATTORNEY-GENERAL *v.* CAMBRIDGE CONSUMERS GAS COMPANY.

Nuisance—Injunction—Breaking up Streets to lay Gas-pipes—Act of Parliament—Construction—Statutory Powers extended by Implication—Practice—Motion for Decree—Amendment at hearing.

Sg 980
15 Eq 170-2

The breaking up of the streets of a town for the purpose of laying gas-pipes without lawful authority, is a nuisance so serious and important, that a Court of Equity will interfere by injunction to prevent it.

Attorney-General v. *Sheffield Gas Consumers Company* (1) not followed.

A local Act of Parliament, passed in 1788, vested the property of all the streets of a town in Commissioners, and empowered the Commissioners from time to time to cause the pavements to be taken up and the streets to be paved, relaid, or altered, and to cause the streets to be lighted, and to contract with any persons for lighting the streets, and gave to the persons to be appointed by them for these purposes full power to do the same:—

Held, that although for the purpose of lighting the streets in the only methods then known, it was not necessary to break up the streets, the Act enabled the Commissioners to adopt every improved method of lighting, and consequently to break up, and authorize other persons to break up, the streets for the purpose of lighting them with gas.

Where a company having no statutory powers, but acting under the authority of Commissioners, commenced breaking up the streets of a town for the purpose of laying gas-pipes, and an information and bill was filed to restrain them, and afterwards the Commissioners revoked their authority, and the suit was brought to a hearing upon motion for decree upon an affidavit of such revocation, but without amendment of the information and bill, the Court being of opinion that the Defendants had acted lawfully so long as they had the authority of the Commissioners, but no longer, refused the motion for decree, but gave leave to amend the information and bill, so as to put in issue the revocation of the authority and the subsequent acts of the Defendants; and ordered the Plaintiffs to pay the Defendants' costs up to the time when the authority was revoked, reserving the subsequent costs.

Revd by L.J. 4 Ch 72

THIS was an information and bill at the relation of and by the *Cambridge University and Town Gas Light Company* (called in this report the Plaintiff company), against the *Cambridge Consumers Gas Company, Limited* (called in this report the Defendant company), and seven of the Commissioners under the *Cambridge* Improvement Acts, and their clerk (as representing the whole body of Commissioners), praying:—1. For an injunction

(1) 3 D. M. & G. 304. 17 Jur 677.

to restrain the Defendant company from breaking, digging up, or disturbing a public road or street, or the footpath abutting upon lands of the Plaintiff company, for the purpose of laying down gas-pipes, and from breaking, disturbing, or interfering with any of the pipes belonging to the Plaintiff company in the university and town of *Cambridge*, its precincts and neighbourhood. 2. An injunction restraining the Defendant company from breaking, digging up, or disturbing, for any like purpose, any of the public streets or highways, lanes, pavements, passages, footpaths, places, or strips of land adjoining thereto, within the limits prescribed by the *Cambridge University and Town Gas Act*, 1867, and from continuing in, upon, or under any such public streets, &c. any pipes, apparatus, or other works already constructed or laid down therein by them. 3. An injunction restraining the Commissioners from assuming to have or exercise the right or power of authorizing or allowing, and from authorizing or allowing the Defendant company to break up or disturb the street, pavement, or footpath adjoining the land of the Plaintiff company, or to remove, disturb, or interfere with the pipes of the Plaintiff company, or to break up or disturb any of the streets, &c. which were under the control of the Commissioners, or any strips of land adjoining thereto.

By the *Cambridge Improvement Act* (28 Geo. 3, c. 64), the property of the streets, &c. in *Cambridge* was vested in the Commissioners, and they, or any five or more of them, were empowered to order any of the pavements to be taken up, and to order the streets to be lighted in such manner as they should think proper, and to contract with any person or persons for the lighting of the streets (1).

The Plaintiff company was originally incorporated by an Act

(1) The following are the material clauses of the Act:—

58. "The property of all the present and future pavements, sewers, drains, or watercourses in the said streets, lanes, and other public passages and places within the said town, as well in the footpaths as carriage ways, and of all lamps, lamp-irons, and posts which shall be erected or fixed by virtue of this Act, and of all materials, implements, and other things which shall be purchased for the purposes of this Act, shall belong to, and the same are hereby vested in the said Commissioners. . .

59. "It shall be lawful for the said Commissioners, or any five or more of them, from time to time, and at all times, when and so often as they shall think proper, to cause, order, and direct all or any of the present or future pavements in the said streets, lanes, pas-

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of Parliament (4 Will. 4, c. 28) in 1834, under the name of the *Cambridge Gas Light Company*. One *John Grafton* had previously erected gas works, and laid down mains for the purpose of lighting the town, under a contract with the Commissioners; the Plaintiff company purchased his works, and since that time they had exclusively supplied the university and town of *Cambridge* with gas.

By a contract between the Plaintiff company and the Commissioners, dated the 30th of May, 1854, the Plaintiff company agreed to light the public streets for fourteen years from the 1st of June, 1854, and by the terms of the contract they were empowered to break up any street for the purpose of the contract.

By the *Cambridge University and Town Gas Act*, 1867 (with which the *Gas Works Clauses Act*, 1847, was incorporated), the Act of 1834 was repealed, without prejudice to existing rights and liabilities, and the Plaintiff company was continued under its present name, and was required to light the streets when required by the Commissioners, and to supply owners or occupiers of premises within the limits of the Act with gas of a certain quality at a certain price, and under certain penalties in case of default; but it was provided that the Act should not deprive the Commis-

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sages, and places, as well in those parts used by carriages as those used by foot passengers, to be taken up, and the said streets, lanes, passages, and places to be paved, relaid, repaired, raised, lowered, or altered: and also the present sewers, cesspools, drains, or watercourses to be altered in such manner as they shall think proper; and to make proper sewers, cesspools, drains, or watercourses for the conveyance of the water from the surface of the carriage ways or highways; . . . . and also to cause, order, and direct the said several streets, lanes, passages, and places to be cleansed and lighted, and all annoyances, obstructions, nuisances, and encroachments to be removed, and proper sewers, drains, cesspools, sinks, gutters, or watercourses to be made for conveying the water off and from the said several streets, lanes, passages, and places, and the several houses and other buildings within the said town, in such manner as the said Commissioners, or any five or more of them, shall think proper; and the persons to be appointed by them for the purposes aforesaid shall and hereby have full power and authority to do the same."

61. "The said Commissioners, or any five or more of them, may, and they are hereby empowered from time to time at any of their said meetings, as occasion shall require, to contract with any person or persons for the paving, relaying, raising, lowering, amending, repairing, cleansing, and lighting the said streets, lanes, public passages, and places, or any part or parts thereof within the said town . . . ."

sioners, or any other person or persons, of any right, power, or authority which they then possessed, or interfere with any right, power, or authority which they might thereafter acquire, of lighting the streets, &c. in any manner they should think proper. The share capital of the Plaintiff company, under their original Act, was £37,440, and by their new Act they had power to increase it to the extent of £50,000.

The Plaintiff company, in pursuance of their Acts, had purchased land and erected buildings and works, and laid down twenty miles of main pipes, and nearly 3000 private service pipes, and erected 660 street lamps.

On the 12th of December, 1867, the Defendant company was registered under the *Companies Act*, 1862, as a limited company, with a nominal capital of £25,000, divided into 5000 shares of £5 each. The memorandum of association, which was signed by seven persons in respect of 280 shares in the whole, stated the objects of the company to be "the supply of *Cambridge* and its vicinity with gas."

On the 21st of January, 1868, the Commissioners made a contract with the Defendant company, who had made a lower tender than the Plaintiff company, for the lighting of the streets of the town for the term of fourteen years from the 1st of June, 1868, determinable by either party at the end of seven years on payment of £700 to the other party. The contract (clause 30) provided that, for the purpose of carrying the contract into effect, the company might break up any street.

The Defendant company issued a prospectus, which stated that the directors "had determined to supply the colleges and private consumers, and had obtained the contract for lighting the public lamps."

On the 5th of March, 1868, the information and bill was filed; it stated the contract between the Commissioners and the Defendant company, and charged that it was unlawful for the Commissioners to give any consent to the Defendant company breaking up, &c. the streets, and that the rights of the Commissioners over the streets were subject to the rights of the Plaintiff company under their Act.

On the 28th of May a motion was made for injunctions as prayed.

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In support of the motion affidavits were made by twenty-five of the chief officers of the university and inhabitants of the town, stating that the opening of the streets by the Defendant company was, in the opinion of the deponents, an unnecessary interference with the traffic of the town, and that, should the laying of their mains be continued generally through the streets of the town, the same must prove, and continue to be, an inconvenience to all persons, whether carrying on business as traders, or residents therein, by the causing, in the first place, trenches to be dug and mounds erected throughout the length and breadth of the town, for the purpose of laying mains, and afterwards, though in a less degree, through the necessity which must arise for breaking up the streets and pavements for such additions, alterations, and repairs as circumstances might require, especially having regard to the narrowness of the *Cambridge* streets; and another set of affidavits by fourteen other inhabitants, who stated that the Defendants had, after laying down their mains, allowed the trenches to remain open and mounds of earth to stand near thereto for a considerable time—in *Saint Andrew's Street* for the whole of one day and the greater part of the following day—in order that service pipes might be connected with the mains for the supply of private houses, thereby causing a lengthened and unnecessary interference with the traffic of the town; that many of the streets of *Cambridge*, and principally some in the centre of the town, which they specifically mentioned, were so narrow that only one vehicle could pass through them at once, and that if the Defendant company were to break up those streets for the purpose of laying such mains, the traffic through the streets would be entirely suspended; and that there were many narrow passages and places in the town of considerable importance for foot passengers, by the opening whereof for the purpose of laying their mains by the Defendant company much inconvenience and annoyance would be caused to the public. An affidavit was also made by the consulting engineer of the Plaintiff company, who stated that the Defendant company were laying their mains close to those of the Plaintiff company, and that it would be impossible for them to continue their work without disturbing and causing great injury to the pipes of the Plaintiff company.

On the part of the Defendant company affidavits were made by their engineer, and by the town surveyor, and by five inhabitants of *Saint Andrew's Street*, to the effect that no material inconvenience had been caused by the opening of the streets for their works; that no injury had been done, or would be done, to the property of the Plaintiff company; and that no additional inconvenience had been caused by laying service pipes to private houses, inasmuch as such pipes had been laid by boring under the pavement from the trenches which were open for the purpose of laying the mains to supply the public lamps.

Upon the hearing of the motion:

Sir *Roundell Palmer*, Q.C., Mr. *Osborne*, Q.C., and Mr. *Locock Webb*, for the Informant and Plaintiffs:—

Under the 59th section of the 28 Geo. 3, c. 64, the Commissioners had no power to take up, or authorize other persons to take up, the pavements, except for the purpose of repaving, or altering the levels of the streets, or of making or altering sewers, cesspools, drains, or watercourses; the power to cause the streets to be lighted, and to contract with persons for lighting them, did not authorize the breaking up of the streets for that purpose, inasmuch as for the modes of lighting then known it was unnecessary to break up the streets, and the Legislature cannot be taken to have contemplated the invention of a mode of lighting which would require such an operation.

[The VICE-CHANCELLOR referred to *Dand* v. *Kingscote* (1), and *Bishop* v. *North* (2).]

The principle of those cases does not apply where the extended use of the right or easement causes additional inconvenience: *Baxendale* v. *McMurray* (3). The fact that in the Plaintiff company's Acts of 1834 and 1867, express powers are given to the Plaintiff company to break up the streets with the consent of the Commissioners, shews that without such additional statutory power the Commissioners could not have authorized the breaking up of the streets. But, whatever may be their power as to the lighting of the streets, they certainly cannot authorize the Defendant

(1) 6 M. & W. 174. (2) 11 M. & W. 418.
(3) Law Rep. 2 Ch. 790.

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company to break up the streets for the purpose of laying private service pipes, which they intend to do: *Reg.* v. *Longton Gas Company* (1).

The VICE-CHANCELLOR stopped the argument, and directed that the motion should stand over till the hearing, and that the cause should be in the paper to be heard, as on motion for decree, on the second cause day after Trinity Term; the Plaintiff company undertaking in the meantime to supply gas to the Commissioners on the terms of the contract of 1854, as if that contract continued in force.

On the 1st of June the works of the Defendant company were not in a sufficiently forward state to enable them to commence lighting the town.

On the 2nd of June a meeting of the Commissioners was held, at which the following resolution was passed:—

"That the *Cambridge Consumers Gas Company* having failed to light the town with gas on the 1st of June, 1868, in pursuance of their contract in such behalf, dated the 21st of January, 1868, it is resolved that such contract be hereby declared null and void, and in no manner binding upon the Improvement Commissioners, and that a copy of this resolution be forthwith sent to the directors, secretary, or solicitor of the said company."

On the 4th of June an affidavit was filed on the part of the Informant and Plaintiffs, stating the above resolution of the Commissioners; but the information and bill was not amended.

On the part of the Defendant company, further affidavits were made by twenty-one inhabitants of the town, who stated that the competition of a second company would, by keeping down the price, and improving the quality of the gas, be a great benefit to the inhabitants, far exceeding the temporary inconvenience of breaking up the streets; and the foreman of the contractors who were laying down the Defendant company's pipes, made an affidavit, stating that five miles of the street mains were complete, that it had not been necessary to stop or divert the traffic in any street, that in the narrow streets the pipes could easily be laid in the early

(1) 29 L. J. (M. C.) 118.

morning before the traffic commenced, and that the trenches had not been kept open for the purpose of laying private service pipes.

On the 28th of June the cause came on for hearing as on motion for decree.

Sir *Roundell Palmer*, Q.C., Mr. *Osborne*, Q.C., and Mr. *Locock Webb*, for the Informant and Plaintiffs:—

As the Commissioners have rescinded their contract with the Defendant company, it is no longer necessary to raise the question whether or not they could authorize the Defendant company to break up the streets for the purpose of public lighting, and it will not be contended that they could give any such authority for the purpose of supplying gas to individuals. The alleged authority being now withdrawn, the Defendant company, by obstructing or disturbing the streets, whether for the purpose of public or private lighting, are committing an illegal act, and a public nuisance: *Ellis* v. *Sheffield Gas Consumers Company* (1); *Reg.* v. *Longton Gas Company* (2). The jurisdiction of this Court to restrain a public nuisance is clear: *Attorney-General* v. *Forbes* (3); but it will be said that this is not such a nuisance as a Court of Equity will interfere to prevent, and that it was so held in *Attorney-General* v. *Sheffield Gas Consumers Company* (4). But in that case the majority of the Court doubted whether the breaking up of the streets by a joint stock gas company was a nuisance at law, and if the cases of *Ellis* v. *Sheffield Gas Consumers Company*, and *Reg.* v. *Longton Gas Company*, had been then decided, they would probably have agreed with Lord Justice *Knight Bruce*, and granted the injunction: moreover, in that case, the great delay on the part of the Informant to some extent influenced the judgment of the majority of the Court. It is true that they also held that the nuisance was infinitesimal, but in the present case it is clear that the inconvenience to the public will be serious and continually recurring. In *Reg.* v. *Longton Gas Company*, the Court of Queen's Bench considered that the breaking up of the streets by a gas company was a serious nuisance, and that public policy

(1) 2 E. & B. 767.
(2) 29 L. J. (M. C.) 118.
(3) 2 My. & Cr. 123.
(4) 3 D. M. & G. 304.

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required that it should only be done by companies incorporated by Act of Parliament, under the restrictions imposed by their Acts. That decision was followed in *Reg.* v. *United Kingdom Electric Telegraph Company* (1), and *Reg.* v. *Train* (2), and in the latter case it was referred to as a well-considered decision. In *Attorney-General* v. *United Kingdom Electric Telegraph Company* (3), the Master of the Rolls retained the information for a year, in order that proceedings at law might be taken to establish the legal right, shewing that he considered that the interference of this Court depended only on the question, whether a nuisance existed. As to the extent of the nuisance, the mains required for the public lighting alone will be twenty miles in extent, and it is plain from their prospectus, and from the evidence of their own witnesses, that the Defendants intend to supply gas to private houses, and it is impossible for them to do that without interfering with the streets, and with the pipes of the Plaintiff company.

If necessary, the Court will allow the information and bill to be amended, so as to state the fact of the rescission of the contract by the Commissioners: *Lord Darnley* v. *London, Chatham, and Dover Railway Company* (4). This could not be done before the hearing in consequence of the order of the 28th of May for accelerating the hearing, but as the issue was raised by the affidavit filed on the 4th of June, which the Defendants might have answered, the Court will deal with the case as if the amendment had been made.

Mr. *Cotton*, Q.C., and Mr. *Fry*, for the Commissioners:—

If it is understood that the Court is not asked to decide that the Commissioners had no power to authorize the Defendant company to break up the streets for the purpose of public lighting, we desire to take no part in the argument.

[The VICE-CHANCELLOR:—I am with you on that question.]

Mr. *Cole*, Q.C., and Mr. *Rigby*, for the Defendant company:—

First: Assuming that the Defendant company are acting without the authority of the Commissioners, still the Court will not grant

(1) 2 B. & S. 647, n. (a). (3) 30 Beav. 287.
(2) Ibid. 640. (4) 1 D. J. & S. 264.

the injunction, but will dismiss the information and bill: *Attorney-General* v. *Sheffield Gas Consumers Company* (1). That case completely governs the present, the only difference being, that there the interference with the streets was very much greater than in this case. Here, as there, the suit is instituted not for the benefit of the public, but in order to secure a monopoly to the Plaintiff company. The Defendant company have completed five out of twenty miles of their main pipes, and none of the witnesses venture to assert that any inconvenience has been caused to the public, but the whole of the evidence on the other side consists of speculation as to possible future inconvenience. As to the private service pipes, the information does not allege that any have been laid or are intended to be laid; the evidence shews that there has been no interference with the streets for that purpose, and the Court cannot assume from the language of the prospectus that the Defendants intend to do an illegal act. As to the alleged injury to the Plaintiff company's property, the evidence wholly fails to support the case. The authority of *Attorney-General* v. *Sheffield Gas Consumers Company*, has never been questioned, and many joint stock gas companies have been established and have carried on their business in reliance upon it. In *Broadbent* v. *Imperial Gas Company* (2), Lord *Cranworth* adhered to his decision in the *Sheffield* case, and expressly stated that the judgment was based upon the assumption that a nuisance had been perpetrated. In *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (3), Lord Justice *Turner* adhered to his opinion expressed in the *Sheffield* case; and in *Cooke* v. *Forbes* (4) Vice-Chancellor *Wood* referred to it as a governing authority. *Reg.* v. *Longton Gas Company* (5), only decided that the occupier of a house cannot break up, or authorize others to break up, the pavement for the purpose of lighting his house, and in that case the *Sheffield* case was not cited. But the two cases are perfectly consistent with each other. The Court of Queen's Bench were called upon to decide the question of legal right, and their decision was not intended to, and cannot, affect the question whether this Court will interfere to protect that right.

(1) 3 D. M. & G. 304. 17 Jur 677
(2) 7 Ibid. 436, 461. 3 Jur N S 261
(3) Law Rep. 1 Ch. 349, 354.
(4) Ibid. 5 Eq. 166, 173.
(5) 29 L. J. (M. C.) 118. 6 Jur N S 601

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Reg. v. *Train* (1), and *Reg.* v. *United Kingdom Electric Telegraph Company* (2), were cases of permanent obstruction of the highway. *Attorney-General* v. *United Kingdom Electric Telegraph Company* (3) never came to a hearing, and it cannot be inferred from the fact of the information and bill being retained for a year that the Master of the Rolls would have granted an injunction when the legal right was established, especially as he did not call upon the Defendants' counsel.

[The VICE-CHANCELLOR:—If you are acting illegally, you will be liable to any number of indictments. Ought not this Court to interfere, once for all, to prevent frequent litigation?]

There is no case in which the Court has interfered to restrain a public nuisance on such a ground. If the nuisance is, as it was held to be in the *Sheffield* case, infinitesimal, the indictments will only result in nominal fines; if it is serious, the fines will be so heavy as to stop the proceedings, and the legal remedy will be sufficient.

Secondly: The case made by the information and bill is, that the Defendant company are breaking up the streets under a contract with and by the authority of the Commissioners, and that the Commissioners had no power to give them such authority. Upon that, which is the sole issue raised by the pleadings, the Court has decided in our favour. It is now suggested that since the suit was instituted that authority has been withdrawn. But the Court cannot receive evidence of a fact not alleged by the pleadings. If the issue were properly raised, the Defendant company would have denied the right of the Commissioners to revoke their authority, and would have gone into evidence upon that question. Nor is this a proper case for amendment at the hearing, as the proposed amendment would raise an entirely new issue not arising out of, but absolutely contradictory to, the issue raised by the present pleadings: *Watts* v. *Hyde* (4); *Bellamy* v. *Sabine* (5); *Lord Darnley* v. *London, Chatham, and Dover Railway Company* (6); *Firth* v. *Ridley* (7). Moreover, leave to amend at the hearing is an indulgence which

(1) 2 B. & S. 640.
(2) Ibid. 647, n. (a).
(3) 30 Beav. 287.
(4) 2 Ph. 406.
(5) Ibid. 425.
(6) 1 D. J. & S. 204.
(7) 33 L. J. (Ch.) 598.

is only granted when the Plaintiff has by some oversight omitted to state some material part of his case: *Lindsay* v. *Lynch* (1): but here the Plaintiffs, though they knew of the alleged rescission of the contract on the 2nd of June, have chosen to bring the suit to a hearing without amendment. The information and bill therefore ought to be dismissed with costs, or, at all events, the motion for decree must be refused with costs: *Thomas* v. *Bernard* (2); *Warde* v. *Dickson* (3).

Mr. *Osborne*, in reply:—

New facts which have occurred since the institution of the suit may be introduced by amendment: 15 & 16 Vict. c. 86, s. 53. In *Walker* v. *Armstrong* (4) the Lords Justices allowed the bill to be amended at the hearing so as to raise an entirely new case.

In the course of the argument the VICE-CHANCELLOR expressed an opinion that the case of injury to the Plaintiff company's property was not made out.

July 1. SIR R. MALINS, V.C.:—

This is a bill and information filed on the 5th of March last, by Her Majesty's Attorney-General at the relation of the *Cambridge University and Town Gas Light Company*; and the bill is a bill by which the same company are made Plaintiffs. Although the information was filed on the 5th of March, no application was made to the Court upon it until the 28th of May, when a motion was made to restrain the Defendants, the *Cambridge Consumers Gas Company, Limited*, and the Commissioners, from breaking up the streets of *Cambridge* for the purpose of laying down gas-pipes by the Defendant company, who, it is admitted, have no parliamentary powers for doing so. But at that time, the 28th of May, the Defendant company had the authority of the Commissioners for paving and lighting the town of *Cambridge* under the Act of Parliament of 1788; and the point relied upon in the argument, so far as it proceeded on that day, was, that inasmuch as the Act

(1) 2 Sch. & Lef. 1.
(2) 5 Jur. (N S.) 31; 7 W. R. 86.
(3) 5 Jur. (N.S.) 698.
(4) 8 D. M. & G. 531.

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of 1788 was passed before gas was known, the powers given by the Act of Parliament for the purpose of breaking up the streets for lighting would not extend to a particular mode of lighting which was unknown at the time, and for many years after the Act passed. Upon the matter being partially opened, it appeared to me desirable for all parties that the cause should be heard; and I therefore, after considerable contest and resistance on the part of the Defendants, ordered the case to stand over until last Monday, and then to come on to be heard in order that the question between the parties might be finally decided as far as this Court is concerned; at least, as far as I am concerned. Accordingly the case stood over. Affidavits of great length have been filed upon the motion. Affidavits of some considerable length have been filed since the motion; and, upon the affidavits both before and since the motion, the matter comes on now to be heard as upon a motion for decree.

Now the main point which has been argued, which is a point of the highest importance, is the general question whether an individual, or an association of individuals called a company, limited or unlimited, can break up the streets and public ways of a town for the purpose of laying down gas-pipes, water-pipes, or pipes for any other purpose, when they are not authorized to do so by Act of Parliament? The general point has been most fully argued on both sides, and I think it is my duty now to give my decision upon the question, in order that if the parties are dissatisfied, they may have the earliest opportunity of taking the opinion of a superior Court upon it.

I will address myself, therefore, to the main question in the first instance. That the preservation of the public streets and highways in a town is of the greatest importance to every inhabitant or frequenter of the town, can admit of no doubt whatever; it is a thing past argument, and addresses itself to the common understanding of all men; and that the breaking up of the streets whenever it takes place, whether it be for the purpose of water, gas, or sewers, is always an annoyance, amounting to a nuisance, causing great inconvenience to those who frequent the streets, cannot admit of the slightest doubt. But it is an annoyance to which it is the common interest to submit, when

done under proper authority and under proper restrictions; and accordingly in all Gas Acts, and the General Gas Act which regulates all gas companies established by Act of Parliament, there are contained restrictions greatly for the benefit of the public, who, though on the one hand bound to submit to the inconvenience of having the public ways broken up, yet also, on the other, have the protection that those who break them up must make the injury cease as soon as possible, and are liable to very heavy penalties and fines if they do not do so. Now, that is the advantage the public has when it is done under competent authority. But if any unauthorized company or individual is to do this, they are not under any restriction if they break up, as to what is the precise time they must lay down again. I do not find that it has been doubted by any Judge whatever that the breaking up of the public streets, under such circumstances, is a nuisance. In the case which is relied upon: *Attorney-General* v. *Sheffield Gas Consumers Company* (1), the Lord Justice *Turner* and Lord Chancellor *Cranworth* both expressly stated that it was a nuisance, but they thought the extent of the nuisance was not such as called for or would justify the interference of this Court. If there was no authority in any way countervailing the decision in that case, it being the decision of Lord Chancellor *Cranworth* and Lord Justice *Turner*, opposed to the very strong opinion of Lord Justice *Knight Bruce*, I must have taken the law from the majority; if these cases were not distinguishable in any way, and the authority of the case had not been in any degree impugned, it would have been my duty to follow it, although I have again and again said, in the course of the argument, that which I now repeat, that the judgment of Lord Justice *Knight Bruce* has my entire and cordial assent, while from the judgment of Lord Chancellor *Cranworth* and Lord Justice *Turner* I wholly dissent. [His Honour read a portion of the judgment of Lord Justice *Knight Bruce*, and continued:—]

On those grounds Lord Justice *Knight Bruce* was strongly of opinion that it was a case for the interference of the Court, but the two other learned and distinguished Judges were of an opposite opinion. I confess the more I have read these judgments—and I

(1) 3 D. M. & G. 304.

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believe I am not wrong in saying that, upon an average, this case is cited before me at least every fortnight, not with reference to a case precisely like the one now before me, but for the general rules laid down—the more I am surprised that two learned Judges, with whose views I generally entirely concur, should have come to the conclusion that the general unlimited license exercised by an unauthorized company to break up the streets of a great town like *Sheffield*, was not such a nuisance as imperatively called for the interference of this Court. My opinion is that it is one of the greatest nuisances to which the public in general and the inhabitants of a town in particular can be exposed. It is a nuisance to which they never ought to be exposed, unless under due authority, where those who are exposed to it can exercise some control and see that the power is exercised within due limits. However, that was the opinion of those two learned Judges, who did not doubt that there was some nuisance, though they did not know whether it would be decided at law to be a nuisance. But the proceedings in that very case were afterwards decided by the Court of Queen's Bench to be a nuisance, and I cannot help thinking that if the Court of Appeal in that case, instead of deciding the case before the action had been tried, had waited, as is the usual practice of the Court, until after it had been tried, those two learned Judges would have concurred with Lord Justice *Knight Bruce* in considering that that which was a nuisance at law, as it was decided to be, which in its nature must necessarily be continually recurring, was that kind of nuisance which it was the duty of this Court to stay by injunction. On these grounds, therefore, unless I find that, in accordance with the subsequent authorities, this case of the *Attorney-General* v. *Sheffield Gas Consumers Company* (1) is now the law of the Court, applicable to the particular circumstances now existing, it is so wholly opposed to my own judgment that I shall not follow it unless I find myself absolutely obliged to do so. And I am very glad to have had the opportunity (I only hope that other Judges may concur with me, for my opinion is very strong on the subject) of expressing my total dissent from the doctrine that anybody, any individual or any association of individuals, be it a company or

(1) 3 D. M. & G. 304.

otherwise, are to have an unlimited authority to break up the public ways of a town, having no restriction by Act of Parliament and having no statutory power whatever. But I am happy to say, although I felt pressed for some time by the authority of these two learned Judges, I cannot help thinking, on the authorities, that I am completely liberated by the subsequent decisions, because it would be indeed a very lamentable thing if upon such a subject as this the Courts of Law and Equity were totally at variance.

I entirely subscribe to the doctrine which has been urged, that it does not follow that because you can maintain and succeed in an action at law, you can obtain an injunction in equity. I have, myself, on many occasions during the short period I have sat here, acted on that principle, and refused to grant injunctions where I have been satisfied that the injury was not material, even in cases in which I have been satisfied that on an action at law being brought a verdict and judgment would probably be obtained. But where the injury is plainly of an obvious and serious character, then I think it becomes the duty of this Court to interfere, to prevent those who are affected by the nuisance from being obliged to bring frequent actions, prefer frequent indictments, or take any other proceedings, frequently calling upon them to be in litigation.

That this opening of the public streets is not allowable, I think cannot be more strongly decided than it has been in the case which has been so much referred to and commented upon of *Reg.* v. *Longton Gas Company* (1). That case is a remarkably strong one—for this reason: there existed an Act of Parliament, authorizing the Commissioners to open all the streets in *Longton* for the purpose of lighting the public streets—that is, for lighting the town; but there was no authority whatever to make communications from the main pipes for the purpose of lighting private dwelling-houses. Having therefore no parliamentary power for the purpose of lighting private dwelling-houses, they took a course which probably would have been thought very reasonable. They opened up communications by means of trenches from their main pipes, which I assume to be in the centre of the street, to the dwelling-houses, which, of course, bounded the streets. They were

(1) 29 L. J. (M. C.) 118. 6 Jur. N. S. 601

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indicted. The matter was tried in the Court of Queen's Bench, and judgment was delivered by the Lord Chief Justice *Cockburn*, which, as I shall shew in the case I am about to refer to in a moment, was the well-considered and mature judgment of the Court. Now, bearing in mind the very extraordinary circumstances under which this case was brought before the Court by indictment, Lord Chief Justice *Cockburn* having stated the circumstance that they had the power for public purposes but that they had none for private purposes, the question was whether this was an indictable offence; did that Court concur with the Lord Chancellor *Cranworth* and Lord Justice *Turner* in the general proposition that opening the public streets, breaking up the public ways of a town, is a nuisance so trivial and unimportant—infinitesimal as it is called by Lord *Cranworth*—that this Court cannot interfere and ought not to interfere against it? The Court of Queen's Bench, by the mouth of Lord Chief Justice *Cockburn*, says (1): "The case is not one" (that is, the case of opening these trenches) "of absolute necessity either for the party or for the public, as in the case of hoarding required during the repairing of a house to protect the public, or as in the case of putting a ladder against a house to clean windows, or to escape in the case of fire. General convenience is greatly against the allowing private persons or companies, without parliamentary powers, to interfere from time to time with the public streets. The making such openings from time to time for water, gas, sewerage, and other purposes, and the opening of the streets for repairs and alterations, are a serious inconvenience, even when done under the restrictions which an Act of Parliament puts upon the persons clothed with parliamentary authority so to act; and it would be difficult to see how far the annoyance might extend if unauthorized dealings of this nature with the highways were allowed. Is every private person"—in the present case it is a joint stock company, with its capital unsubscribed for, and a little money paid up, and I am at a loss to see on what principle, if this joint stock company is entitled to do it, there may not be ten other joint stock companies in *Cambridge* claiming to exercise the same rights. This company is established, I suppose, by one set of merchants or traders in the

(1) 29 L. J. (M.C.) 124. 6 Jur. (N.S.) 605

town of *Cambridge*, and if another set of merchants or traders, in the same town, thought fit to establish another company, on the principle contended for by the Defendants they might claim unlimited license to break up the highways. Another company afterwards may do the same thing, and then the inhabitants of *Cambridge* may never know when they may be able to pass through the streets—"Is every private person" says the Lord Chief Justice, "to be at liberty to open the streets for laying down a pipe to any gas works, or to any conduit of water, or to any well or fountain in a market-place? How far is such a right to extend if everybody may lay down such a pipe from the nearest water or gas?—how great would be the inconvenience from the continual opening of the streets for the first laying down and for the constantly recurring purpose of repairing. Were such private rights, as to gas, sewerage, and water pipes, to be allowed, the highways would be in a constant state of obstruction. The present is an exceptional case, where it happens, from the fact of the mains being laid for public purposes, that it is more easy to get at the supply of gas than in ordinary cases; but this ought not to affect the principle. The case does not seem to us to fall within what may be called the ordinary incidents and rights, which, in common sense and from common use, are understood to appertain to the enjoyment of property. On the contrary, such a right as is here claimed, of interfering with the streets, is never exercised except under the authority of Acts of Parliament, conferring special powers, with great care and under proper control—in the case of gas, by placing the companies supplying it under the provisions of the general *Gas Works Clauses Act*, according to which the parties are subjected to wholesome restrictions, and to the control of the magistrates. We think, therefore, that the obstructions in question are indictable, and that the conviction was right, and the verdict must be entered accordingly."

Now, with regard to the opinion of Lord *Cranworth* in the case of the *Sheffield Gas Company* (1), I cannot help thinking that that must be considered as materially modified by what he said in a somewhat analogous case of *Broadbent* v. *Imperial Gas Company* (2). There the object of the bill was to prevent a nui-

(1) 3 D. M. & G. 304. (2) 7 D. M. & G. 436, 461.

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sance by a gas company, not by an unauthorized opening of the mains, but by sending forth noisome effluvia, which destroyed the vegetation in the Plaintiff's garden, near the *Thames*. The Plaintiff had brought an action; the action had been referred to an arbitrator; the arbitrator had made an award in favour of the Plaintiff; namely, that he did sustain damage. The matter came before Lord *Cranworth* when Lord Chancellor in 1857, that is, four years after the *Sheffield Gas* case, and he speaks of the *Sheffield Gas* case in this way (1): "It was argued before me, as it had been before Vice-Chancellor *Wood*, that the Plaintiff was not entitled to any relief, independently of that clause, upon the ground that this Court is not bound to issue an injunction, and that, in issuing an injunction, whether interlocutorily or, at the hearing of the cause, perpetually, it will take into account, to some extent at least, the comparative injury that would result to the parties respectively from issuing or withholding the injunction. Now, I gave full attention to this argument, and I considered it as it was going on, and afterwards with a view to satisfy myself as to the state of the law upon that subject, and particularly with reference to the case of *Attorney-General* v. *Sheffield Gas Consumers Company* (2), in which this Court had acted upon that principle where clearly a nuisance was perpetrated by the gas company. There the Court refused to interfere by injunction. I have used the expression 'clearly a nuisance,' as the ground of the judgment proceeded upon that assumption, although undoubtedly some members of the Court, myself and, I believe, Lord Justice *Turner*, did throw out a doubt whether it could be considered a nuisance; inasmuch as, though the company had no legal authority to take up the soil, in order to put their pipes down, yet, as they were lawfully constituted a company, and the Legislature had contemplated the possibility of such a company existing lawfully without an Act of Parliament, their works, from the nature of things, could not be carried on without taking up the soil of the road or street for a short time; and we had some doubts, therefore, whether the Legislature might not be considered as sanctioning such a use of the public highway. Those doubts have since been entirely removed by a decision of the Court of Queen's Bench, upon the trial of that

(1) 7 D. M. & G. 460-463. 3 Jur. N.S. 226 (2) 3 D. M. & G. 304. 17 Jur. 6

case, when it was determined that there was no authority in anybody, without an express Act of Parliament, to take up or interfere with the pavement of a street, or the soil of a road, and that the company, by so doing, were necessarily guilty of a nuisance, and might be proceeded against."

Now, I read that as an admission by Lord *Cranworth* that if, when the *Sheffield* case was before him and Lord Justice *Turner*, it had been decided that it was a nuisance, their judgment would have been the other way; and I read it therefore as an admission by him that it was only because it was not decided to be a nuisance that their judgments were as they stood. He proceeds: "But whether that be so or not, it is quite clear the judgment of this Court proceeded upon the assumption that there was a nuisance, though it would not interfere by injunction where the evil was so infinitesimal to the persons complaining." Then, a little lower down, he says: "Now, attending to the principles laid down in that case, I cannot come to the conclusion that there was anything there decided to warrant this Court in withholding the relief of an injunction to a person seriously and constantly injured by unlawful acts. If it should turn out that the company had no right so to manufacture gas as to damage the Plaintiff's market garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on." There he is speaking as to the Plaintiff being obliged to bring frequent actions, and it was agreed he might from time to time bring actions for the nuisance. He then says: "But unless the company had such a right, I think the present is not a case in which this Court can go into the question of convenience or inconvenience, and say where a party is substantially damaged that he is only to be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law, and I quite agree with the Vice-Chancellor in holding that in such a case this Court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas." Now, there Lord *Cranworth* puts it very much on the ground that if the Plaintiff did not get an injunction, he would have to bring an action *toties quoties*. The same principle, I say, is perfectly

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clear to me from the decision of the Court of Queen's Bench. In every case in which this company proceeds to open the pavements or the highways of the public streets of *Cambridge* they will be liable to an indictment, which indictment, according to the decision of the *Longton Case,* must be successful; and upon the principle upon which Lord *Cranworth* decided that the Plaintiff in *Broadbent's Case* should be protected in bringing frequent actions, I say it is also the duty of this Court to protect these parties from being obliged to prefer frequent indictments to restrain a nuisance in the town of which they are inhabitants, or in which they are interested. The principle of the *Longton Case* came again under the consideration of the Court of Queen's Bench, in the case of *Reg.* v. *Train* (1). Mr. *Train* was a person who suggested a plan of laying down public tramways in the streets of *London*, or the roads adjoining *London*, and for running a particular kind of omnibus, which certainly precluded the public from using that part of the road. He was indicted for it—the indictment was successful—and the indictment led to the necessity of his abandoning these tram-roads; we have it solemnly decided by the Court of Queen's Bench. Mr. Justice *Crompton*, in delivering the judgment of the Court of Queen's Bench, says (2): "A carriage meeting an omnibus running on one of them cannot give and take the road. This case is like that of *Reg.* v. *United Kingdom Electric Telegraph Company* (3), which we have just disposed of, and others of a similar nature. It also falls within *Reg.* v. *Longton Gas Company* (4), with which we took a good deal of pains, where a gas company without being authorized by statute opened trenches in the streets of a town for the purpose of laying down gas pipes, and this was adjudged a nuisance. If persons"—now this paragraph is material to the decision, because it is immaterial whether it is persons or an association called a limited company,—"if persons wish for power to act as the Defendants acted here, they must take the usual regular and constitutional course of getting the protection of the Legislature." The only direct authority upon this branch of the case, which has been suggested to be of any importance, is the case before the Master of the

(1) 2 B. & S. 640. (3) 2 B. & S. 647, n. (a).
(2) Ibid. 647. (4) 29 L. J. (M.C.) 118.

Rolls (1). That is a case in which the *Electric Telegraph Company*, without any parliamentary or other authority, thought fit to take possession of a portion of the soil by the side of the turnpike road. Then they erected posts for their telegraphic lines, and for that an information was filed. I take it to be perfectly clear that the putting up these posts, not in the centre of the road or where they could interfere with the traffic, but, as it appears on the statement of the case, on the ground adjoining the road, was a nuisance of so trivial a character, that if the case of the *Sheffield Gas Company* was applicable, it was a case in which the interference of the Court was not necessary. What course did the Master of the Rolls take? He ordered it to stand over in order that the legal right might be ascertained, that is, by an indictment. Accordingly he says (2): "This case depends upon a legal right, which must be established to the satisfaction of the Court before the equity can be administered; without it it would be impossible to say that either the acts of the company or the works amounted to a nuisance. The one side insists that the works cause an obstruction, and on the other side persons are found to say they do not; but no tribunal is so fit to try this question of fact as a jury, who will have the assistance of a Judge to direct them as to the law." The matter stood over, it was tried, and found to be a nuisance. Mr. Justice *Crompton*, in the passage I have just read, speaks of the *Electric Telegraph Company's Case*, which they had just disposed of; they had disposed of it by deciding it was a nuisance. I concur in the observations of Mr. *Cole*, that it does not necessarily follow that when a matter stands over in order that the legal right may be decided, the Court will grant an injunction when the legal right is decided. It only goes to this extent: if the legal right is not established, the bill will be dismissed; it does not necessarily follow if it is established that the injunction will be granted. But I take it to be perfectly clear that in the *Electric Telegraph Company's Case* the Master of the Rolls intended to grant an injunction if the result of the legal proceedings was, to prove it to be a nuisance. It was shewn at law to be a nuisance, and it was never again brought before the Court of Equity, because I see the note in *Best & Smith* states that the *Electric Telegraph*

(1) 30 Beav. 287. (2) 30 Beav. 294.

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Company, finding it impossible for them to carry on their business while every individual had the power of preferring an indictment against them, thought fit to obtain an Act of Parliament. I say if the Defendant company were to attempt to act as was done in that case, it is my deliberate opinion that it would be impossible for them to carry out the scheme of lighting the town of *Cambridge* without parliamentary powers, because they are liable at every step they take to an indictment being preferred against them. Then I think the only case which has been cited as having a bearing upon this, or being similar to it, is the *Sheffield Gas Case*. That case is very frequently cited. It has never been cited in a case like this, but is usually cited for the general rules laid down there, that the Court will not interfere in the case of an injury, by way of nuisance, unless it is material. The case has never been cited on the question of opening streets, from the time it was decided until the present time.

On these grounds I come to the conclusion on the general question, which has been argued before me fully and ably on both sides, that the breaking up of the public streets by an unauthorized company like this Defendant company is illegal—it is a nuisance of so serious and important a character, and must in the very nature of things be so frequently repeated, that it is my duty in the present state of the law to give my decision against the company—to hold that they are doing wrong, and must be enjoined by this Court against opening any other part of the streets than those which have been already opened. I stated in the course of the argument I could not give a mandatory injunction to remove those pipes which have been put down. It is not at all necessary to do that, because being down and once covered they will not in the slightest degree interfere with the traffic until the Defendants re-open the streets to take them up; that is to say, to order them to take them up again would be to order them to repeat the nuisance, which, I think, is not to be tolerated.

Now, I have so far proceeded as if this case had come on the record fully raising these questions because it has been so argued, and as if I were now in a situation to decide this question; but now comes a very important circumstance, which I am not at

liberty to overlook—that the information and bill was filed on the 5th of March last, and that when the motion came before me on the 28th of May, this company had the authority of the Commissioners of the town of *Cambridge* by Act of Parliament for what they were doing.

The Act of 1788, which has been so frequently referred to, is "An Act for the better paving, cleansing, and lighting the Town of *Cambridge*, for removing and preventing Obstructions and Nuisances, and for widening the Streets, Lanes, and other Passages within the said Town." The 58th and 59th sections of this Act were relied upon, and it was argued by the counsel for the Attorney-General and the Plaintiffs that what the Defendants were doing was illegal, because, although it was admitted—indeed it could not be denied—that at that time, by virtue of this contract of the 21st of January, 1868, which the limited company had entered into with the Commissioners appointed by this Act of Parliament, they had the power to break up the streets, it was contended that this Act of Parliament did not authorize the breaking up of the streets for the purpose of lighting with gas, because gas was unknown at the time the Act was passed. Now, I referred to the case of *Bishop* v. *North* (1), which was a case where a right was reserved to make a railway to a mine. It was a very old reservation, long before locomotive engines were known. It was there argued there could be no right of making a railway constructed for the purpose of locomotive engines, because they were not known at the time when that reservation was made. There it was held that the right was a right to make a railway embracing all improvements, and, therefore, that it would not be a reasonable construction to say, because old and ill-constructed waggons were in use when the reservation was made, therefore that those in whose favour it was made were bound in all times to use ill-constructed waggons. On the same principle I shall hold, in this case, that the right of breaking up the streets for lighting is a right of breaking up for every improved mode of lighting, and therefore that, when gas came into use, as it did about twenty years after the Act of Parliament was passed, which was in 1788, the necessary meaning of this Act of Parliament is, that those who

(1) 11 M. & W. 418.

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have the power of taking up the pavements for the purpose of lighting may break them up for the purpose of the best mode of lighting which exists.

Now, it turns entirely on the 58th and 59th sections.—[His Honour read the sections, and continued:—] I find from my notes that Sir *Roundell Palmer*, when the motion was on, argued that there was no power by this section to break up the pavements for the purpose of lighting. No doubt it is not so in express language, because, nothing but oil lamps being known at that time, it would only have been necessary to break up the pavements for the purpose of putting the lamp-posts in; but as it contains a general power of breaking up the pavements for cleansing, lighting, and watering, I hold the proper construction is, that they have a power to break up for the purpose of lighting, and of communicating light in a manner which was unknown at that time, by means of pipes communicating with the main gas-pipes. Then I also think that not only had they the power of breaking up for the purposes of lighting, as well as those other purposes, for which it was in the contemplation of the Legislature that it would be necessary to break up the streets, but I think the object of the Legislature was to give the Commissioners power to break up the roads and pavements for any purpose contemplated by the Act, that is, for cleansing and lighting the town. They are therefore, in my opinion, authorized by this Act to open the pavements and break up the ways for the improved mode of lighting, which is the improved mode brought in by gas. On that point, therefore, I am against the Plaintiffs.

The result of this is, that if this information had been brought on upon the materials which existed at the 28th of May, it would have been my duty to dismiss it, because not only had the Commissioners, by the words of the Act of Parliament, the power of doing this, but the contract which was then in force, and remained in force until the 2nd of June, provided this: "For the purpose of carrying into effect this contract, the company may break up any street." When the motion was made before me on the 28th of May, this limited company were armed with the authority of the Commissioners, who had the power to give it to them, and so far from their acting without a legal authority, they were acting under legal authority, and if it had not been for the revocation of that

authority by the meeting of the 2nd of June, it would have been my duty to dismiss this information, and I think I must have dismissed it with costs. But, on the 2nd of June, a meeting of the Commissioners took place, and passed the resolutions which are set out in the affidavit. Therefore, the Commissioners have now resolved to rescind the contract, upon the ground that the limited company have not performed their part of it. On the 1st of June, when they ought to have been illuminating the town with gas, they had not a single pipe ready. Therefore it is not to be wondered at that, under the circumstances, the Commissioners declared the contract to be rescinded, and have given formal notice to the Defendant company that the contract is rescinded; and until the contrary is shewn, seeing as I do, and as it is admitted, the Defendant company is in default, I must assume that the notice to determine the contract was a valid notice.

This introduces a totally new state of things, which came into existence on the 2nd of June. Up to the 2nd of June the Defendant company were right in proceeding with their works, as it was sworn they intended to do, and as they avow they intend to do. Since the 2nd of June they have been entirely wrong, according to my judgment. But this fact of their being wrong is not stated upon the record. Under these circumstances, what is to be done? I feel I must, up to the period these Plaintiffs were wrong, make them pay the costs. But, then, what course am I to take? Am I to dismiss the bill without prejudice to another being filed, or am I to take that course which I am happy to find was the course adopted by my learned predecessor, Vice-Chancellor *Kindersley*, under such circumstances, of giving leave to amend the bill? The great advantage of amending the bill is this. If I dismiss the bill, all the evidence that has been taken in this suit will be unavailable in another. If I give leave to amend the bill by stating the rescission of the contract on the 2nd of June, and relying upon the illegal acts of the Defendants since that, the evidence which has been given will be available in the new case. The question, therefore, is whether I am at liberty, under these circumstances, to give leave to amend the bill. I should have thought the better course would have been for both parties to agree to the suggestion I made, namely, that the bill should be now considered as

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amended, by alleging that the contract has been rescinded, and that the Defendant company should be considered as putting in an answer denying that it has been rescinded. However, that has not been acceded to, and therefore I am not able to proceed on the assumption that that has been done. But I shall act on the principle adopted by the Vice-Chancellor *Kindersley* in *Thomas* v. *Bernard* (1), where upon motion for decree the Vice-Chancellor held that, the case having failed as it was then presented, the motion might be dismissed and liberty given to amend the bill, and to bring on the cause again in a regular way, as upon an amended record. That seems to have been deliberately done by him, and I do not find that it has ever been in the slightest degree questioned. Therefore, and especially as I find it was done by Vice-Chancellor *Kindersley* on another occasion also, I must assume the rule is there correctly laid down.

Then, upon the general question of amending, the case of *Lord Darnley* v. *London, Chatham, and Dover Railway Company* (2) is most important. It has been read by the counsel on both sides, and the circumstances of the amendment in that case have been stated, and are well known. I only refer to one passage in the judgment of Lord Justice *Turner*, where he concludes by expressing his opinion that there must be liberty to amend the bill. He says (3): "Upon the circumstances of the present case, I think that leave to amend should be given, but I think that the leave should be confined to putting in issue claims founded upon the agreement, or matters arising thereout, or connected therewith, and such facts and circumstances as may be necessary or proper for bringing forward and supporting such claims; and I think it more just that the costs should be reserved than that they should be dealt with as in *Bierdermann* v. *Seymour*" (4). Therefore, in that case, the Lords Justices did not dispose of the costs at the time, but reserved them.

The same course was followed also, I think, to a very great extent in the case of *Walker* v. *Armstrong* (5), in which the Lords Justices gave leave to amend the bill in such a manner as wholly

(1) 5 Jur. (N.S.) 31; 7 W. R. 86.
(2) 1 D. J. & S. 204.
(3) 1 D. J. & S. p. 220.
(4) 1 Beav. 594.
(5) 8 D. M. & G. 531.

to alter the case. It is stated not to have been strongly opposed. However, I take it to be quite clear that, however strongly opposed it might have been, the result would have been the same. The Lords Justices there, acting upon the same principle, seeing that the case was brought forward in a manner which would have worked very great hardship, gave leave to amend. Upon the principle, therefore, not only of *Thomas* v. *Bernard* (1), but in exact conformity, as I conceive, with the Lords Justices' decision in *Darnley* v. *London, Chatham, and Dover Railway Company* (2), and in *Walker* v. *Armstrong* (3), I think myself at liberty to give leave to amend, so as to bring forward the case of the wrong-doing by these Defendants since the authority of the Commissioners was withdrawn. That, I believe, disposes of the whole case.

I desire it to be understood now that I have decided the main case as if the bill had been amended, because it has been most fully argued before me, and I desire to be understood as having now decided the main point in favour of the Plaintiffs. If the bill is amended, I do not desire, nor will I allow any further argument before me. It may go to another tribunal, and I will give every facility for that. But I decide the case as if the bill had been amended, as it has been argued so; and upon the main point I decide that it is a nuisance so great and so intolerable that it is the duty of this Court to stop it by injunction.

The nuisance is now going on as threatened since the withdrawal of the authority of the Commissioners of the 2nd of June. Therefore, I treat the case as if the information and bill had been filed on the 3rd of June and as if the affidavit had been filed since that time. On these grounds I give liberty to amend. I think the Plaintiffs must pay the costs up to the 2nd of June, because up to the 2nd of June the Defendants had lawful authority, and were in the right. From that time they have been wrong. Therefore I give liberty to amend, in conformity with what I have just read from Lord Justice *Turner*—that is, so as to put in issue the fact that the Defendant company have now no authority from the Commissioners for disturbing the public ways of *Cambridge*. That is the only point I want it amended upon. Then, as to the

(1) 5 Jur. (N.S.) 31; 7 W. R. 86. (2) 1 D. J. & S. 204.
(3) 8 D. M. & G. 531.

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subsequent costs, the best way will be to reserve them. I do not see any use in keeping the Commissioners here. The information and bill will be dismissed without costs as against the Commissioners. I say without costs, because they have changed their views.

July 29. The information and bill having been amended,

Mr. *Osborne*, Q.C., and Mr. *Locock Webb*, for the Informant and Plaintiffs, moved for an injunction in the terms of the second paragraph of the prayer (except the mandatory part).

Mr. *Cole*, Q.C., and Mr. *Rigby*, for the Defendant company, said that after the expression of the opinion of the Court on the former occasion, they did not intend to argue the question, but submitted that, as the right of the Informant and Plaintiffs to relief was founded upon the revocation of the authority of the Commissioners after the institution of the suit, they ought to have instituted a new suit: *Attorney-General* v. *Portreeve, Aldermen, and Burgesses of Avon* (1).

Sir R. Malins, V.C., said, that he had already disposed of the case. The objection now taken ought to have been raised on the former occasion, but he did not think that the case cited applied. The injunction must be granted.

Solicitors for the Informant and Plaintiffs: Messrs. *R. & C. H. Hodgson.*

Solicitors for the Defendant Company: Messrs. *J. & C. Cole.*

Solicitors for the Commissioners: Messrs. *Sharpe, Parkers, & Pritchard.*

(1) 33 L. J. (Ch.) 172.

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1868

May 26, 28; *June* 2.

Easement—Light and Air—Garden—Contract—Derogating from Grant.

The Plaintiff took a lease for ninety-nine years, containing the usual covenant for quiet enjoyment, of a piece of ground upon which a house had been built for him by his lessor. A garden was attached to the house, having a wall round it seven feet high. The Plaintiff's lessor subsequently let the adjoining land to the Defendant, who erected thereon a mews, having a wall twenty-three feet high, running the whole length of the Plaintiff's garden. The Plaintiff's house was not twenty years old. The Plaintiff filed a bill to restrain the erection of the Defendant's wall, on the ground that it interfered with the free access of light and air to, and the enjoyment of, his garden :—

Held, that there was no contract, express or implied, in the covenant for quiet enjoyment, or otherwise in the lease, that the enjoyment of the garden as a garden should not be interfered with, and that, in the absence of such contract, interference with the access of light and air to the garden was not a ground for the interposition of the Court.

BY an Act of Parliament passed in the year 1854, intituled the *Earl of Harrington's Estate Act*, the Earl of *Harrington*, who was tenant for life of certain land in the parish of *Kensington*, was authorized to grant building leases of such land, comprising about forty-six acres. In 1859, the Plaintiff entered into a contract with *William Jackson*, who was the lessee of the Earl of *Harrington*, for a lease of a piece of the before-mentioned land, being 36 feet in breadth, and 120 feet in depth ; and it was agreed between the Plaintiff and *W. Jackson*, that the latter should erect for the Plaintiff on this land a dwelling house for a sum of between £3000 and £4000. When the house was built a lease was executed, dated the 9th of December, 1859, by the Earl of *Harrington* of the first part, *W. Jackson*, his lessee, of the second part, and the Plaintiff of the third part. By that lease the Earl of *Harrington*, at the direction and upon the nomination of *W. Jackson*, demised the land, with the house upon it, together with all rights, members, easements, and appurtenances, actual or reputed, to the said premises belonging, to the Plaintiff for ninety-nine years at a ground rent of £10. The lease contained a covenant in the following words :—"And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the lessee, his executors,

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administrators, and assigns, that he and they paying the rent hereby reserved, and performing the covenants and agreements hereinbefore on his and their parts contained, shall peaceably possess and enjoy the hereby demised premises for the term hereby granted, without any interruption by the lessor, or his heirs, or his or their assigns, or any other person or persons lawfully claiming by, from, or under them or any of them."

The piece of land so demised was situate in the *Cromwell Road, Kensington,* by which it was bounded on the south; on the east, north, and west sides thereof it was bounded by other land forming part of that which was included in the Act of Parliament, and in the contract between the Earl of *Harrington* and *W. Jackson;* and at the time the lease was granted the Plaintiff not only had free and uninterrupted access of light and air to his messuage and premises, but also an uninterrupted view for some distance. The Plaintiff's house was thrown back from *Cromwell Road* ten feet, the depth was about fifty feet, and the land at the back extended another sixty feet, which was laid out by the Plaintiff as an ornamental flower garden, and was surrounded by a wall seven feet high.

Some time after the date of the Plaintiff's lease an agreement was entered into between *William Jackson* and the Defendant *George Smith,* a builder, for the erection by the Defendant of certain messuages and other buildings upon the land included in the lease from the Earl of *Harrington* to *W. Jackson;* and in pursuance of that agreement the Defendant lately erected on the eastern side of the Plaintiff's premises several large houses fronting the road called *Queen's Gate,* the backs of which houses were about thirty feet from the Plaintiff's land; on the Plaintiff discovering that the wall at the end of the garden attached to these houses, which abutted upon the wall of the Plaintiff's garden, was being raised higher than his garden wall, and considering that it would interfere with the access of light and air to his premises, he complained to the Defendant, and after several interviews it was agreed that the Defendant's wall should be built fifteen inches above the coping of the Plaintiff's garden wall. At the time of this agreement, the Defendant had commenced the erection of certain buildings on the western side of the Plaintiff's premises, apparently for stables, and the Plaintiff caused a notice, dated the

30th of March, 1868, to be served upon the Defendant, to the effect that if the buildings so to be erected on the western side should prejudice his rights, by interfering with the access of light and air to his premises, he should apply to the Court of Chancery for an injunction.

On Easter Monday, the 13th of April, 1868, the wall immediately adjoining the Plaintiff's garden on the west was rapidly built up to a height of sixteen feet above the Plaintiff's wall, whereby, as the bill alleged, the free access of light and air to the Plaintiff's house and garden was greatly obstructed and diminished.

The bill prayed that the Defendant might be restrained from proceeding with or continuing any buildings or wall on the western side of the Plaintiff's premises which would interfere with the free access of light and air to his premises; and, by consent, it was agreed that the motion for an injunction should be treated as the hearing of the cause.

In support of the bill evidence was given to the effect that the wall would materially interfere with the access of light and air both to the house and garden, and would considerably depreciate the value of it. This was denied by the Defendant's witnesses.

On the part of the Defendant there was an affidavit by *Jackson*, the lessee, that the Plaintiff was well aware that a mews had been planned to run from the *Cromwell Road* northwards to the *Gloucester Road*, and that the stables and outbuildings to be erected thereon would abut on his western wall.

The Plaintiff denied that he was aware that a mews had been planned, and stated that he understood at the time of taking the ground, that a house or houses of a similar character and construction with his own, and having a similar garden to his, would in due course be erected on the west side of his premises, by which neither his light nor air would be at all diminished.

Mr. *Glasse*, Q.C., and Mr. *Walford*, for the Plaintiff:—

The Plaintiff has been in possession of the property less than twenty years, therefore he has no prescriptive right to the light and air, but the injunction is claimed on the ground of contract. Mr. *Jackson*, the lessee of the Earl of *Harrington*, joined with the Earl in demising this piece of land with the house then erected

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upon it, and all rights, members, easements, and appurtenances thereto belonging, to the Plaintiff. By that demise the lessors granted an easement to the Plaintiff, which comprised a right of using and enjoying the land demised for a certain specified purpose, that of building a house and occupying a garden attached to the house. The lessor knew what the land was required for, and how it was to be used; and where the owner of an estate demises part of that estate, and a house forms portion of the estate, with certain rights and easements attached to it, he has no right to deal with the adjoining land in such a manner as to derogate from his own grant: *Gale* on Easements (1), and the cases there collected. If the lessor had contemplated dealing with the adjoining land so as to prejudice the Plaintiff's rights under his lease, he should have expressly reserved to himself a right to do so; it was not for the Plaintiff to negative such right by express contract: *Suffield* v. *Brown* (2); *Crossley* v. *Lightowler* (3.) What the Defendant has done derogates from the lease, and the covenant for quiet enjoyment contained in the lease is broken. The covenant is, that the lessee shall peaceably possess and enjoy the demised premises without any interruption by the lessor. The Plaintiff is now prevented from enjoying the premises by the improper interruption of the Defendant himself, and the case is therefore within the express terms of the covenant.

The VICE-CHANCELLOR intimated that there was no case for interference in respect of the windows of the house.

Mr. *Pearson*, Q.C., and Mr. *Langworthy*, for the Defendant:—

When the land was demised to the Plaintiff he perfectly well knew that the whole of the forty-six acres were to be covered with buildings, and there is evidence that he, or his surveyor, was shewn a plan of the buildings which included the mews now erected. There was no concealment on the part of the Defendant, and if the Plaintiff had been so anxious to preserve one uniform height for the erection of walls by his neighbours, he should have caused a restriction to this effect to have been inserted in the lease. The

(1) 3rd Ed. p. 81. (2) 10 Jur. (N.S.) 111; 33 L. J. (Ch.) 249.
(3) Law Rep. 2 Ch. 478.

covenant for quiet enjoyment is in the ordinary terms used in every lease, and applies to the enjoyment of the land demised, so that the lessee shall not be evicted, or otherwise prejudiced, for want of title in the lessor; but how could it possibly be construed to mean a covenant to preserve the right to the Plaintiff to have no other house erected, or wall built, higher than the Plaintiff's house or wall? The diminution of light and air is so trivial, that the bill never could have been sustained upon the law of prescriptive right to light and air, supposing the Plaintiff had occupied his house for twenty years. In fact, the chief complaint is, that the air which used to blow over the garden is now interrupted by a wall. The Plaintiff might as well rest his case upon an interruption of his view. A man can have no easement in a view over a vacant space of ground: *Roberts* v. *Macord* (1).

As regards the case of *Clarke* v. *Clark* (2), it is now quite understood that, whatever Lord *Cranworth* decided, it does not amount to conferring any more right to light and air in one district than in another, and that case is, in no respect, an authority in favour of the Plaintiff. The decision in *Suffield* v. *Brown* (3) was overruled upon appeal, and therefore is of no authority. The principle acted upon in *Back* v. *Stacey* (4), *Dent* v. *Auction Mart Company* (5), and *Beadel* v. *Perry* (6), defines the degree of obstruction sufficient to call for the interference of a Court of Equity, and the Plaintiff's bill cannot be supported on the principles laid down in those cases.

June 2. SIR R. MALINS, V.C., after referring to the principal passages in the affidavits on both sides, continued:—

Taking the Plaintiff's own statement, it is plain that he knew he was taking a piece of building ground; that immediately adjoining it there was other building ground on which houses were to be erected on both sides, although he denies that he knew that any stables were to be erected. The house of the Plaintiff having been erected within the last ten years, he cannot, of course, sustain any

(1) 1 M. & Rob. 230.
(2) Law Rep. 1 Ch. 16.
(3) 10 Jur. (N.S.) 111; 33 L. J. (Ch.) 249.
(4) 2 C. & P. 465.
(5) Law Rep. 2 Eq. 238.
(6) Ibid. 3 Eq. 465.

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claim founded on prescription; and if the windows of the Plaintiff had been ancient lights, I am of opinion that the building of the Defendant does not produce such a material injury as would have justified the interference of the Court. The Plaintiff, therefore, being unable to sustain his bill upon the ground of interference with ancient lights, his case must be rested, and was by his counsel rested, upon contract. Now, the situation of the parties at the time this contract was entered into has been made perfectly clear by the affidavits on both sides. The Plaintiff knew that Mr. *Jackson*, with whom he entered into the contract, was the lessee of the Earl of *Harrington* of this large area of building ground. He knew the plans were then in contemplation, which have now been carried into effect to a great extent, of covering that land with very large houses. He knew, as he states, that if there were not to be a mews or stables on the adjoining land, there was, at all events, to be another house, or other houses, of similar character to his own. Now, if there were to be houses, it is clear that all the mischief he has now experienced he might have experienced in a far higher degree by the erection of other houses on this land. But the Plaintiff knowing that this was to be building land, takes his lease, by which the land is demised to him with the house upon it, and neither the contract which was the foundation of the lease, nor the lease itself, contains one single stipulation as to the width, depth, height, or anything as to the character of the buildings to be erected on the adjoining land.

The adjoining land being of the same depth as the Plaintiff's, it is obvious that a person who had taken the adjoining land—the very land on which the Defendant has erected these stables—might, if he had thought fit, have covered it with buildings. There is no stipulation to prevent his doing so; and, therefore, if some gentleman who had taken this land had had a fancy for a large and deep house, there was nothing to prevent his covering the whole area of the land by building the actual house or the appurtenances to the house upon it. For instance, a picture gallery or a billiard room might be substituted for a flower garden. In the present case there is no contract, unless it can be made out from the lease granted to the Plaintiff. It is admitted that there is nothing in the demising part that can affect the rights of the

Defendant. But it was contended that the erection of this wall to the additional height of sixteen feet is prohibited by the covenant for quiet enjoyment, which is in the ordinary form and comprised in all leases. The erection of this wall is an interruption of a view undoubtedly, and it is an interruption of the free flow of air which existed before; but this is a covenant which relates solely to the land demised—it has no relation to any other land whatever. It professes to be a covenant for the quiet enjoyment of the land "hereby demised," and nothing else; and all the contract is, that the lessee shall enjoy the land hereby demised, without any interruption by the lessor, his heirs or assigns. In fact, a covenant for quiet enjoyment is nothing more than would have been implied from the terms of the demise. A man who has once granted a thing cannot derogate from his own grant, and that which he has contracted another shall enjoy, he must be permitted to enjoy; but it is perfectly clear to my mind that this covenant for quiet enjoyment relates only to quiet enjoyment without any interruption or disturbance of the thing or piece of land demised.

Then, as to the garden. I intimated to the learned counsel in the course of the argument, that if the case had rested upon the interference with the light of the windows, I thought it had so entirely failed on the Plaintiff's own shewing, that I should not have called upon the Defendant's counsel at all; but the case was very much pressed on account of the injury to the Plaintiff's garden. On that subject I must admit that I feel for the Plaintiff; and there is no doubt it is a matter of great annoyance to him. It will render his garden much less agreeable than it was; but if he attached so much importance to this, he has only himself to blame for not having insisted when he took his lease from the Earl of *Harrington's* lessee, Mr. *Jackson*, upon having inserted in the contract a covenant to protect him. It is a very common thing in laying out plans for building to have stipulations that the buildings to be erected shall only be of a certain value and certain dimensions or qualities, and that certain spaces shall be maintained as open spaces; therefore, it was quite within the power of the Plaintiff when the erection of his house commenced, to have stipulated with Mr. *Jackson* and the Earl of *Harrington*, not only that he himself was to maintain an open space, but that all

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who came near him should maintain a similar space, and, moreover, that the wall of seven feet which bounds his garden should remain of a stipulated height; but, having all that in his power, he omits to take any protective clause whatever, and rests his case on general principles of law. I entirely accede to the argument of the Defendant's counsel, that there can be no prescription for light and air over open ground, because the prescription for ancient light is a thing of limited extent. It can only be in favour of ancient lights, that is, those which have existed for twenty years; and if it were once admitted with regard to open land, the consequence would be that no man could ever build to the edge of his own land, because the owner of the next land might say, "It is very true I have never used this land for building purposes, but I have been in the habit of laying out linen or timber to dry there, and if you build a house next to it, I can no longer use it for the same purpose." That would be a restriction which would be highly inconvenient and contrary to the rule of law.

In *Roberts* v. *Macord* (1), though only a *nisi prius* case, there is the expression of the opinion of Mr. Justice *Patteson*. The marginal note correctly states the case: "The use of an open space of ground in a particular way requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air." Therefore, in the present case, and in all others, it must be well understood that, however agreeable and beautiful a garden may be, if another person has land immediately adjoining it, neither the pleasure derived from the scent or sight of the flowers will prevent the owner of the adjoining land from erecting whatever buildings on his land he thinks fit.

The substance of this case is that it interferes with the Plaintiff's enjoyment of his garden, and that is not a ground upon which the Court can interfere in the absence of express contract. For that I need only refer to the case of *Suffield* v. *Brown* (2), where it will be remembered that *A.*, being owner of a dock and wharf, in using the dock it had become necessary, on account of its being so small, that whenever a considerable-sized ship went into the dock, the bowsprit went over the wharf. In 1845 the pro-

(1) 1 M. & Rob. 230. (2) 10 Jur. (N.S.) 111; 33 L. J. (Ch.) 249.

4 De G. J. & S. 185.

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prietor sold the wharf to one person, and in 1846 he sold the dock to another; and the proprietor of the dock contended that he had a right to have the bowsprits go over the land as they had done for the last twenty years. So the Master of the Rolls thought; but on appeal before Lord *Westbury* he decided, on general principles, that if you are to interfere with the ordinary enjoyment of property it must be by contract, and that no such contract, express or implied, existed in that case. On the same principle I say, that Lord *Harrington* and those claiming under him had a right to use the adjoining plots of land for all purposes for which building land could be used, and, among others, for the purpose of erecting stables or other buildings. If the Plaintiff had been anxious to prevent it, he could have prevented it. His case, therefore, wholly fails, and the bill must be dismissed.

As regards the costs. I think the Plaintiff was led to believe that, if he acquiesced in the addition of fifteen inches to the height of the eastern wall, the Defendant would not add anything more to any of the walls; but in defiance of that the Defendant, on a day which is generally considered a holiday, rapidly erected this wall sixteen feet higher than the Plaintiff's wall.

I think the justice of the case will be met by dismissing the bill without costs.

Solicitors for the Plaintiff: Messrs. *Parker, Lee, & Haddock.*
Solicitors for the Defendant: Messrs. *Cope, Rose, & Pearson.*

In re SAYER'S TRUSTS.

V.-C. M.
1868
July 10.

Construction—Will—Gift to Children of Woman past childbearing—Remoteness.

Gift to a married woman for life, with remainder to her children for life, and a gift over to the grandchildren:—

Held, that evidence that at the date of the will the married woman was past the age of childbearing was not admissible for the purpose of shewing that children then living were meant, so as to make valid the gift over, which otherwise was void for remoteness.

THE testator, *Benjamin Sayer*, by will dated in 1810, made the following bequest:—"It is my will and mind, and I do hereby

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direct, that my said executors shall pay the interest, dividends, and annual proceeds of £7000 £3 per Cent. Reduced Bank Annuities, and £3000 £4 per Cent. Consolidated Bank Annuities, of my stock in the *Bank of England*, unto my said brother, *Joseph Sayer*, for life, and after his decease unto his wife, *Susannah Sayer*, for life, and after her decease unto the children of the said *J. Sayer*, and *Susannah* his wife, equally, share and share alike, for life; and after the decease of all the said children, I give and bequeath the said £7000 £3 per Cent. Bank Reduced Annuities, and £3000 £4 per Cent. Consolidated Bank Annuities, unto and equally amongst such of the grandchildren of the said *J. Sayer*, being lawful issue, as shall be then living."

At the date of the testator's will *Susannah Sayer* was sixty-two years of age, and the question was, whether that fact could be taken into consideration in determining whether the gift to the grandchildren was void for remoteness.

Mr. *Osborne*, Q.C., and Mr. *B. L. Chapman*, for the Petitioner, the residuary legatee of the testator's estate:—

The gift to the grandchildren is void for remoteness, and the Court cannot travel out of the will and inquire into the age of *Susannah Sayer*, so as to confine the gift to the children then living: *Jee* v. *Audley* (1).

Mr. *E. Cutler*, for some of the grandchildren:—

The wife of *Joseph Sayer* was past the age of childbearing at the date of the will, and the testator must be considered to have been aware of that fact. This case differs from *Jee* v. *Audley*, as in that case the wife was found past the age of childbearing at the date of the testator's death; but here she was past that age at the date of the will; and *Jee* v. *Audley* is not a case which would be followed. The Court will take into consideration the surrounding circumstances of the case; and in *In re Overhill's Trusts* (2) the age of the mother was inquired into to ascertain who were the class to take.

Mr. *Woodroofe*, and Mr. *Cecil Russell*, for other Respondents.

(1) 1 Cox, 324.

(2) 17 Jur. 342; 1 Sm. & Giff. 362.

SIR R. MALINS, V.C. :—

It has been argued in this case that I must read the gift to the grandchildren of *John Sayer* as if the testator had said "now living," or "now born," and therefore that the gift is valid. That argument is founded on the fact that *Susannah*, the wife of *Joseph Sayer*, was upwards of sixty years of age at the death of the testator; and undoubtedly if the testator had been properly advised, he would have added some such words, as he knew that no other children could be born.

But it is impossible not to see that if I were to do so, I should be admitting parol evidence. One of the most sacred principles of law is, that a written instrument must be construed upon the face of it, and that no parol evidence can be used for the purpose of inserting any words not therein contained.

But to admit any such evidence would be attended with the utmost danger, because at present a lawyer on looking at an instrument can say whether a gift is good or void for remoteness; whereas if such parol evidence were admitted an inquiry would be necessary in every case into the position of beneficiaries named in it. It is true this is a hard case; but it is better that cases of particular hardship should occur, than that settled rules should be disturbed.

I must, therefore, refuse to admit such parol evidence, and hold that the gift to the grandchildren is void for remoteness.

Solicitor for the Petitioner: Mr. *J. Shaw.*

Solicitors for the Respondents: Mr. *J. Shaw;* Mr. *H. H. Hallett.*

V.-C. M.
1868
June 27.

In re KERSHAW'S TRUSTS.

Will—Power of Advancement—Setting up Husband of Cestui que Trust in Trade.

A power in a will for trustees to apply a certain proportion of a fund, settled for the separate use of a married woman for life, with remainder for her children, at any period of her life for her advancement or benefit :—

Held, under special circumstances, to authorize an advance to her husband, on his personal security, for the purpose of setting him up in trade.

JAMES KERSHAW, who died in 1864, by his will gave the proceeds of his residuary estate (subject to an annuity of £4500 to his widow for life) in trust for his daughters equally, the share of each daughter to be for her separate use for life, without power of anticipation, and after her death for her children, or remoter issue, as she should appoint, and in default of appointment for the testator's grandchildren, issue of the same daughter, and if none of such grandchildren should attain the age of twenty-one, or marry, then for his other daughters. And he empowered his trustees "to apply at any period or periods of the life of each such daughter, for her advancement or otherwise for her benefit, any part or parts not exceeding in the whole one-half of the capital of her share."

The testator left eight daughters. His residuary estate was worth about £270,000, and the income of each daughter's share, after providing for the annuity, was about £1250.

One of the daughters, in 1864, married a Mr. *Tidman*, who had for some time previously held an appointment in the East worth £1500 a year, but was induced by his wife and her relations to settle in *England*, and enter into a partnership, which expired on the 1st of January, 1868. He now desired to renew the partnership for seven years, but for that purpose he required a further capital of £5000, and he and his wife requested the trustees of her father's will to advance that sum out of her share in the estate, Mr. *Tidman* offering to execute a bond to the trustees in the penal sum of £10,000, to secure the payment of £5000 to them at the expiration or dissolution of the partnership, or in the event of his ceasing to reside in *England*, with interest in the meantime at

5 per cent. If he could not renew the partnership he intended to go back to the East, in which case his wife would be compelled either to separate from him or to leave her children in *England*.

The trustees presented a Petition under the 30th section of *Lord St. Leonards' Act* (22 & 23 Vict. c. 35), stating their belief that the proposed application of the £5000 would be for the benefit of Mrs. *Tidman* and her children, and their willingness to make the advance if the Court should be of opinion that they ought to do so, and praying for the opinion, advice, and direction of the Court whether they ought, under the power in the will, to apply the £5000 in the manner proposed.

Mr. *Osborne*, Q.C., and Mr. *Rowcliffe*, for the Petitioners, referred to *Talbot* v. *Marshfield* (1).

Mr. *Cotton*, Q.C., and Mr. *Bush*, for Mr. and Mrs. *Tidman* and their children, and the other daughters of the testator, supported the proposed application.

SIR R. MALINS, V.C.:—

The words of this power are very large; the trustees may apply any part not exceeding half the share at any period of the daughter's life for her advancement—that is a word appropriate to an early period of life—or otherwise for her benefit. The husband of one of the daughters requires a capital of £5000 for the purpose of carrying on a business which, in the opinion of the trustees, is likely to be successful, and if he cannot get this capital he must go abroad, and leave his wife and children. I think that in such a case what is for the benefit of the husband is for the benefit of the wife, and I shall answer the question in the affirmative, that the trustees may and ought to advance the money to the husband on the terms proposed by him. The costs must come out of Mrs. *Tidman's* share.

Solicitors for the Petitioners: Messrs. *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Respondents: Messrs. *Woollacott & Leonard.*

(1) Law Rep. 3 Ch. 622.

V.-C. M.
1868
June 27.

SIMONS *v.* McADAM.

Foreclosure Suit—County Court Acts—Jurisdiction—Costs.

In a suit to foreclose a mortgage for £40, where both Plaintiff and Defendant lived at the same place:—

Held, that the Plaintiff was entitled only to such costs as he would have obtained in the County Court.

THIS was a suit for foreclosure of a mortgage of some property at *Birkenhead*, originally made to secure a sum of £10 advanced upon the execution thereof, and nine other sums of £10 each thereby agreed to be advanced.

The mortgagor and mortgagee both resided at *Swansea;* and the sum due on the mortgage was £40.

Mr. *Fry*, for the Plaintiff, asked for the ordinary foreclosure decree.

Mr. *W. F. Robinson*, for the Defendant, referred to *Scotto* v. *Heritage* (1); and observing that there were no special circumstances in the case which required the Plaintiff to sue in this Court, asked that such costs only might be given as the Plaintiff could have obtained in the County Court.

Mr. *Fry*, in reply, contended that the jurisdiction of the Court of Chancery was in no way ousted by the County Court Acts, and that the jurisdiction of the County Court was purely concurrent.

The VICE-CHANCELLOR:—The Defendant admits that, but says it is vexatious in you to file a bill, where you might have obtained relief much more cheaply in the County Court at *Swansea.*

Mr. *Fry*:—The suit has not been conducted in a vexatious manner; the bill extends only over two pages, and only one affidavit has been filed in support of it. There may have been reasons which induced the Plaintiff to prefer a decree in this Court to one by the County Court; and as the Legislature has left him a choice, he ought to be at liberty to exercise it.

(1) Law Rep. 3 Eq. 212.

SIR R. MALINS, V.C.:—

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I assume that the County Court has only a jurisdiction concurrent with that of this Court; but the object of the County Court Acts was to bring home justice to every man's door, and save persons in humble circumstances the expense of having recourse to this Court. It was also the object of these Acts to relieve this Court from these small cases, when there are so many cases of importance to be decided; and I shall do everything in my power to discourage such trifling cases being brought here. I have heard nothing to shew me that this case might not have been equally well disposed of in the County Court at *Swansea*, where both parties reside; and therefore I give the Plaintiff a decree, with such costs only as he would have obtained in the County Court.

Solicitor for the Plaintiff: Mr. *A. C. Spaull.*
Solicitors for the Defendant: Messrs. *Field, Roscoe, & Co.*

In re FAITHFULL, AND *In re* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

V.-C. M.
1868
May 9.

Solicitor and Client—Lien for Costs—Solicitor discharged by Client—Production of Documents relating to pending Litigation.

Although a solicitor who discharges himself cannot set up a lien for costs as a reason for not delivering up papers necessary to enable his client to proceed with pending matters in litigation to which they relate; yet a solicitor who has been discharged by the client may set up such lien, and will not be ordered to produce or deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in prosecuting or defending his claims. Such lien is a general one, and extends to all costs due from the client to the solicitor.

In re Bevan and Whitting (1), distinguished.

13 Eq. 442.
7 L.D. 319
12 L.D. 354
13 L.D. 886

THIS was a motion, that upon Messrs. *Baxter, Rose, & Norton* giving to *George Faithfull* an undertaking in writing to prosecute certain cases for compensation under the provisions of the *Lands Clauses Act*, and that such briefs, shorthand writers' notes, and other documents, as should be delivered to them under that

(1) 33 Beav. 439.

V.-C. M. 1868 *In re* Faithfull. *In re* London, Brighton, and South Coast Railway Co.

order, should be received by them without prejudice to any right of lien, and should be returned to the said *George Faithfull* within ten days after the hearing of such compensation cases undefaced, the said *George Faithfull* might be ordered forthwith to deliver up to Messrs. *Baxter, Rose, & Norton,* all such briefs, &c., as they might deem necessary, the company offering to pay into Court £1000.

It appeared that in July, 1867, Mr. *Faithfull,* who had acted as solicitor to the company, was discharged, except as to four or five pending matters, and Messrs. *Baxter, Rose, & Norton* were appointed the new solicitors of the company. In March, 1868, Mr. *Faithfull* having brought an action for costs against the railway company, was discharged as to these pending matters also. In one of these, a compensation case, which had been referred to arbitration, the claimant's case had closed, and the newly-appointed solicitors were unable to proceed without having the briefs, &c., in the case delivered over to them. Mr. *Faithfull* claimed about £21,000 for costs from the company, and declined to produce or deliver over such papers, &c., on the ground that he had a lien on them for costs due from him to the railway company.

Mr. *Fry,* for the company, in support of the motion:—

A solicitor cannot, by enforcing his lien for the purpose of obtaining payment of costs, prevent his clients obtaining justice: *Cane* v. *Martin* (1); *Seton* on Decrees (2); *Commerell* v. *Poynton* (3). And that rule prevails whether a solicitor discharges himself or is discharged by his client, as *In re Bevan and Whitting* (4): *Morgan's* Orders (5); subsequently affirmed on appeal by Lord *Westbury* (not reported, but the order on appeal was produced in Court).

Mr. *Faithfull* can only enforce his lien for costs in the particular matter, and the company by their motion offer to pay £1000 into Court.

Mr. *Glasse,* Q.C., and Mr. *Taylor,* for Mr. *Faithfull*:—

The form in *Seton* on Decrees applies to a case where a solicitor discharges himself, and not where he is discharged by the client,

(1) 2 Beav. 584.
(2) Vol. ii. p. 857.
(3) 1 Sw. 1.
(4) 33 Beav. 439.
(5) 4th Ed. p. 20.

as in this case. Lord *Eldon*, in *Lord* v. *Wormleighton* (1), and *Ross* v. *Laughton* (2), has laid down that a solicitor discharged by the client is not bound to afford the client any facilities, even as to pending matters: *Morgan* and *Davy* on Costs (3); *Griffiths* v. *Griffiths* (4); *In re Moss* (5); *Pullen's* Law of Attorneys (6).

The lien is a general lien, and may be enforced to secure the payment of all costs due from the client to the solicitor: *Bozon* v. *Bolland* (7).

Mr. *Fry*, in reply.

SIR R. MALINS, V.C.:—

This is an application that Mr. *Faithfull* may deliver up to the new solicitors of the company papers relating to four matters, without which the new solicitors cannot proceed with those matters. This is opposed by Mr. *Faithfull*, on the ground that if he delivers over those papers the company will get all that is valuable in them, and his lien will be of no value, because the company might apply in every other case in which they might want the papers, and his lien would be valuable in name only.

This being the state of things, the law seems to me to be clear, that if a solicitor chooses to discharge himself he cannot leave his client in the lurch in the middle of a matter, because his client cannot supply him with money, or by reason of any other difficulty; if he does, he must produce (but not give up) to the new solicitor all papers necessary to enable him to prosecute or defend the matter in litigation.

But it has been contended that Mr. *Faithfull* must produce these papers, and that it makes no difference whether Mr. *Faithfull* discharged himself or was discharged by the company, and Mr. *Fry* referred to the case of *Commerell* v. *Poynton* (8), and I was at first struck by the decision in that case. But it appears that the principle was further considered by Lord *Eldon* in *Lord* v. *Wormleighton* (9), who says that he ought to be able to make

(1) Jac. 580.
(2) 1 V. & B. 349.
(3) Page 294.
(4) 2 Hare, 587.
(5) Law Rep. 2 Eq. 345.
(6) Pages 112, 368.
(7) 4 My. & Cr. 354.
(8) 1 Sw. 1.
(9) Jac. 580, 582.

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use of the non-production of the papers in order to get at what is due to him; that is, in other words, he may embarrass the client in order to force him to pay what is due to him; and the motion for production was refused. The same decision was arrived at in *Griffiths* v. *Griffiths* (1); and in *Bozon* v. *Bolland* (2) it was held that the solicitor who had been discharged by his client could not be compelled to afford his client any facilities, and that his right of lien extended to all that was due to him, and not only to the amount due in respect of the particular matter to which the papers sought to be produced related.

That appears to be the general rule, and the only difficulty which arises is on the decision in *In re Bevan and Whitting* (3), affirmed by Lord *Westbury*. That being so recent a decision, if the circumstances had been the same in this case, and if the Lord Chancellor had decided that the new solicitor could call on the former solicitor who had been discharged to produce the papers, I should have been bound to follow it. But in that case it appears, from the orders which have been produced, that production was ordered in order to proceed with taxation of bills of costs, and, moreover, that upon the cash account a sum of £104 appeared due from the solicitor to the client, and there was no *constat* that anything was due to the solicitor from the client. The Lord Chancellor affirmed that order, but added, that if on the result of the taxation any balance appeared due to the solicitor, the papers should within seven days be handed back to him.

The case of *Cane* v. *Martin* (4) was one in which the client discharged himself; and the order in *Seton* on Decrees (5) is also the form applicable in such a case.

On the authorities I have referred to, I consider that I am bound to refuse this application for production, and the motion must therefore be refused with costs.

Solicitors: Messrs *Baxter, Rose, Norton, & Co.;* Mr. *G. Faithfull.*

(1) 2 Hare, 587.
(2) 4 My. & Cr. 354.
(3) 33 Beav. 439.
(4) 2 Ibid. 584.
(5) Vol. ii. p. 857.

VERET *v.* DUPREZ.

V.-C. M.
1868
May 8.

Receiver—Administrator pendente lite—Probate Act of 1857 (20 & 21 *Vict. c.* 77, *ss.* 70, 71).

Where, after proceedings had been commenced in the Probate Court to test the validity of a will, a bill was filed for a receiver of the alleged testator's personal estate, and a motion made for a receiver, which motion stood over, and during its pendency the Court of Probate appointed an administrator *pendente lite*, under the 70th section of the *Probate Act* of 1857:—

Held, that it was the intention of the Legislature to extend the powers of an administrator *pendente lite* appointed by the Court of Probate, and such administrator having the same power of protecting the property as a receiver, the Court refused to appoint a receiver.

THIS was a motion on behalf of the Plaintiff for a receiver, and the question was, whether this Court would appoint a receiver of personal estate where the Court of Probate had made an order for the appointment of an administrator *pendente lite* under the powers conferred on that Court by the 70th section of the *Probate Act* of 1857 (20 & 21 Vict. c. 77).

On the 10th of March, 1868, proceedings were taken in the Probate Court for the purpose of testing the validity of the will of M. *Bonte*, a Frenchman, domiciled in *England*. On the 17th of March a bill in Equity was filed by the alleged testator's next of kin and a motion made for a receiver; this motion stood over for the Defendant to answer affidavits, and in the meantime the Court of Probate appointed an administrator *pendente lite;* and the question was, whether this Court would, under these circumstances, appoint a receiver?

A portion of the property was claimed under an alleged gift *inter vivos*, said to have been made to avoid payment of duty.

The 70th section of the *Probate Act* of 1857, provides for the appointment of an administrator *pendente lite* of the personal estate of the deceased person whose will is being contested, such administrator to have all the powers of a general administrator, other than the right of distributing the residue of the personal estate. The 71st section provides for the appointment of a receiver of real estate.

V.-C. M. 1868 VERET v. DUPREZ.

Mr. *Glasse*, Q.C., and Mr. *E. Cutler*, for the Plaintiff, in support of the motion:—

Under the old practice, before the *Probate Act* of 1857, the Court would have granted a receiver for the protection of property during litigation, although the Ecclesiastical Court had appointed an administrator *pendente lite* to collect the assets: *Mitford* on Pleading (1); *Edmunds* v. *Bird* (2); *Atkinson* v. *Henshaw* (3); *Rendall* v. *Rendall* (4). That jurisdiction could only be curtailed by express legislative enactment, and there is nothing in the *Probate Act* of 1857 which ousts the jurisdiction in Equity. It is true the powers of an administrator *pendente lite* are extended by the *Probate Act* of 1857 but there is no such machinery in the Court of Probate for the protection of property as exists in the Equity Courts.

Moreover, there is in this case a claim of part of the property by the Defendants under a gift *inter vivos*, with which this Court alone can deal.

Mr. *Cotton*, Q.C., and Mr. *L. Field*, for the Defendant, the executrix named in the will:—

Whatever might have been the practice before the Act of 1857, the administrator appointed by the Court of Probate has, under that Act, such extended powers, that where an administrator has been appointed by the Court of Probate this Court will not appoint a receiver, and there is no case in which this Court has done so. The administrator *pendente lite* has under the Act of 1857 very nearly the same powers as an executor, and the Court of Chancery will not grant a receiver where the property is in the hands of an executor, unless the position of the property is such as to warrant the interference of the Court: *Whitworth* v. *Whyddon* (5).

Mr. *Glasse*, in reply, referred to *Horrell* v. *Witts* (6), as shewing that an administrator *pendente lite* had not the same powers as a receiver appointed by this Court.

(1) 4th Ed. p. 135.
(2) 1 V. & B. 542.
(3) 2 Ibid. 85.
(4) 1 Hare, 152.
(5) 2 Mac. & G. 52.
(6) Law Rep. 1 P. & D. 103.

1868 73.

SIR R. MALINS, V.C. :—

The question as to the jurisdiction of this Court to appoint a receiver under the circumstances of this case is a new one, and it is admitted that there is no rule on the subject. If the motion for a receiver had been heard on the 17th of March, it would have been my duty to have granted a receiver; but since that time the Court of Probate has appointed an administrator *pendente lite*, under the powers conferred by the 70th section of the *Probate Act* of 1857, and the question is not whether this Court has jurisdiction, but whether, having jurisdiction, it will exercise it by appointing a receiver to do that which the administrator appointed by the Probate Court can do without the intervention of this Court.

I am satisfied that the intention of the *Probate Act* of 1857 was to extend the powers of an administrator *pendente lite;* and in his work on Executors, Mr. Justice *Williams* says (1): "A question may arise whether the practice of the Courts of Equity as to the appointment of receivers should be altered by reason of the extension of the power of the Court of Probate by the 70th and 71st sections."

The order of the Probate Court appointing a receiver is very much to the same effect as that which I should now have to make, referring it to Chambers to appoint some fit and proper person receiver. The 70th section declares that the administrator when appointed shall have all the rights and powers of a general administrator, other than the right of distribution of the residue of the personal estate, and shall be under the immediate control and direction of the Court. He is to get in the estate, and, with that exception, do everything that an executor could do if probate had passed, but he must act under the direction of the Court. With regard to the objection raised, that there is a claim of a gift *inter vivos*, I apprehend that it would be competent for the legal personal representatives to apply to the Judge of the Court of Probate, who would direct what should be done in the matter.

Being perfectly satisfied, then, that the Legislature intended to give the Probate Court jurisdiction to appoint an administrator *pendente lite*, with full powers of dealing with the property, except

(1) Page 479, n., 6th Ed.

V.-C. M. 1868 VERET v. DUPREZ.

distributing the residue, and that no receiver appointed by me could do anything more in protecting the property than could be done by such administrator, I am of opinion that it would not be proper for me to appoint a receiver, the only effect of which would be to bring on an unseemly conflict between the two Courts.

The motion must stand over, to ascertain whether the order appointing an administrator *pendente lite* is prosecuted. Costs will be costs in the cause.

Solicitors: Messrs. *Weir & Robins;* Mr. *E. Manière.*

V.-C. M. 1868 *June* 1.

CROSSLY *v.* DIXON.

Practice—Concise Statement—15 & 16 *Vict. c.* 86, *s.* 19—*Leave to amend.*

The Court will give leave to amend a concise statement with interrogatories, after the answer to the interrogatories has been put in, where the Defendant states that the amendment is important for the purpose of making out his case.

THIS bill was filed in July, 1866, to enforce the payment of certain royalties. The first answer was filed in November, 1866, the second in March, 1867, and the third in April, 1867. The cause was put in issue in October, 1867. On the 28th of October the Defendant filed a concise statement with interrogatories, under the 15 & 16 Vict. c. 86, s. 19, and the interrogatories had been answered.

The Defendant then applied to the Chief Clerk in Chambers for leave to amend his concise statement. The Chief Clerk was of opinion that leave should be given, but at the request of the Plaintiff the question was adjourned into Court.

An affidavit was made, that since the concise statement was filed the Defendant had discovered new and important matter, without which his case could not be fully brought before the Court.

Mr. *Speed* for the motion:—

It was the intention of the Act which authorizes the filing of a concise statement that it should be substituted for a cross bill, and

there is nothing in the Act to restrict the Court in exercising the same power of giving leave to amend that it has in respect of a cross bill. The clause in the Act is not restrictive, but merely permits the adoption of a cheaper and easier method of obtaining discovery than by filing a cross bill. This benefit would be done away with if the Defendant were unable to amend his concise statement and the interrogatories founded upon it.

Mr. *Cracknall* for the Plaintiff:—

The Act provides an alternative process, that is—the Defendant may file a cross bill under the old practice, or he may proceed to obtain the discovery he requires by means of a concise statement with interrogatories. If he choose to elect the latter mode of proceeding he must file his concise statement once for all, and is not at liberty to amend it. This is shewn by the fact that no times are laid down in the Act limiting proceedings, as there are with respect to other modes of procedure. The Court has therefore no power to give leave to amend. No case is reported in which such an application has been made. The only authority referred to in *Morgan's* Chancery Acts is that of *Mertens* v. *Haigh* (1), which does not affect this case.

SIR R. MALINS, V.C.:—

It is very singular that this question has never been decided, and that for the sixteen years during which the Act has been in operation this is the first time the point has been raised. This is, at all events, well known, that the object of giving the Defendant leave to file a concise statement was to provide a more simple and expeditious mode of getting discovery than was obtainable by means of filing a cross bill, and therefore it was confined to a Defendant who has fully answered the Plaintiff's bill. The remedy would fall far short of justice, if a Defendant, having obtained important information subsequently to filing his concise statement, were not at liberty to amend and improve his statement, and found consequential interrogatories upon the new facts. I think, therefore, that on principle a Defendant ought to have the same right to amend a concise statement that he would

(1) 1 J. & H. 231, 2 W. R. 198

V.-C. M. 1868 CROSSLY v. DIXON.

have to amend a cross bill. If the Court had no power to give leave in such a case, I think some authority upon the point would have been found; but so far from it, the only case cited in Mr. *Morgan's* book as bearing on the question is *Mertens* v. *Haigh* (1), where Vice-Chancellor *Wood*, under special circumstances, refused to take a concise statement off the file, but considered it irregular to file the statement before the exceptions had been disposed of. The Court has, I think, the same control over this mode of proceeding as it has over all other proceedings in the Court, and it appears to me to be right that the Defendant should have liberty to amend his statement. It is not necessary for him to say that he has discovered new matter, but it is sufficient to say that it is important for the purpose of making out his case. Liberty must, therefore, be given to amend, and as the Chief Clerk decided in favour of the application, the party at whose instance the matter was adjourned into Court must pay the costs.

Solicitors for the Plaintiff: Messrs. *Watkins, Baker, & Baylis.*
Solicitor for the Defendant: Mr. *Bristow.*

V.-C. M. 1868 *May* 1.

CRANE *v.* KILPIN.

Income Tax—Interest on Debts—Assignment for Creditors.

Where a fund was assigned to trustees upon trust to pay a fixed sum annually to creditors *pro ratâ*, with interest till payment:—

Held, that the assignor was entitled to deduct income tax on the payments in respect of interest.

THE question on this Petition was, whether income tax should be deducted on interest on debts under the following circumstances:—A debtor assigned a fund in Court, in which he was interested, to trustees upon trust to pay £300 a year to his creditors in payment of their debts *pro ratâ*, with interest on such debts at the rate of £5 per cent. till payment. In making the several payments of interest, no deduction had been made for income tax, and the question was whether, in finally settling with his creditors, the

(1) 1 J. & H. 231.

V.-C. M.
1868
CRANE
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assignor was entitled to deduct the income tax on the several payments of interest.

Mr. *Bevir*, for the Petitioners, claimed that the assignor was entitled to deduct income tax on the interest, and referred to *Bebb* v. *Bunny* (1).

Mr. *Kekewich*, for the creditors, submitted that the creditors were entitled to receive the interest on their debts without any deduction for income tax.

SIR R. MALINS, V.C. :—

In every case where delay occurs in the completion of a contract, and the purchase-money bears interest, the person paying such interest is entitled to deduct income tax on such interest. Here the creditors stand in the position of incumbrancers on the fund assigned, and the assignor, either himself or through his trustees, would have been entitled to deduct the income tax on the interest. That was not done; but now, on finally settling with his creditors, the assignor will be allowed the income tax on the payments of interest.

Solicitors for the Petitioner: Messrs. *Garrard & James.*
Solicitors for the Respondents: Messrs. *Singleton & Tattershall.*

In re GORDON'S TRUSTS.

V.-C. M.
1868
April 17.

Practice—Costs—Petition for Payment of Dividends—Trustees' Costs.

Costs of trustees who were served with and appeared upon Petition by tenant for life for payment of dividends *held* to be payable out of *corpus*.

THIS was a Petition asking payment to the Petitioners, tenants for life of the dividends of funds which had been paid into Court under the *Trustee Relief Act*. The Petition prayed that the costs of the trustees might be paid out of income.

(1) 1 K. & J. 216.

V.-C. M. 1868 *In re* Gordon's Trusts.

Mr. *Darby*, for the Petitioners, now asked that the costs of the trustees might be paid out of *corpus*.

Mr. *Dauney*, for the trustees, submitted that the costs of the trustees were payable out of income: *In re Marner's Trusts* (1).

Mr. *Darby*, in reply:—

The case of *Marner's Trusts* relates only to the costs of the Petition, and not to the costs of the trustees.

Sir R. Malins, V.C.:—

I am of opinion that the case of *In re Marner's Trusts* does not affect the present question, the only point there being the costs of the Petition. The payment into Court was for the benefit of all parties, including the remaindermen, and I think the trustees' costs must be ordered to be paid out of *corpus*.

Solicitors: Messrs. *Hooke & Street*.

V.-C. M. 1868 *June* 26.

CLARK *v.* SIMPSON.

Practice—Petition—Costs—Respondents unnecessarily served—Respondent necessarily served but claiming no Interest.

Persons unnecessarily served with a Petition, and persons necessarily served but claiming no interest in the subject matter of the Petition, are entitled to their costs of appearing upon the hearing of the Petition.

6 Ch. 78

By an order made in this suit, and in a suit of *Lord Rivers* v. *Clark*, it was ordered that certain moneys should be paid to the credit of this suit in discharge of a bond debt due by Lord *Rivers* to *Clark*, the Plaintiff in this suit, upon which *Clark* had created several incumbrances, and that thereout certain payments should be made to the Defendant *Simpson*, and to Messrs. *Churchill & Barry*, and others, on account of certain mortgage securities and costs, and that the balance should be carried to the account of Messrs. *Dear, Lewis, Phillips, Nolan, Davis, Shirley*, and *Angel*,

(1) Law Rep. 3 Eq. 432. 12 Jur. N. S. 959

and that the fund should not be dealt with except on notice to Lord *Rivers* and *Shirley*. *Nolan* was a mortgagee of other property belonging to the Plaintiff, and his name was inserted in the account by mistake; the other six persons named in the account were the incumbrancers on the fund.

This was a Petition presented by *Davis* for an account of the incumbrances and their priorities, and for payment of his debts and costs out of the fund. The Petition had been served on the Plaintiff and on the other persons named in the order, including *Simpson* and *Churchill & Barry*.

Mr. *Mackeson*, Q.C., and Mr. *L. Mackeson*, for the Petitioner.

Mr. *Osborne Morgan*, for *Nolan*, asked for his costs.

Mr. *Schomberg*, Q.C., Mr. *Pearson*, Q.C., Mr. *E. James*, Mr. *Crossley*, and Mr. *Roberts*, for the other incumbrancers, submitted that *Nolan*, having no interest, ought not to have appeared, and that in such cases it was not the practice in other branches of the Court, especially at the Rolls, to allow a Respondent his costs of appearing at the hearing: *Morgan* and *Davey's* Costs in Chancery (1); but that, if *Nolan's* costs were to be allowed, they ought to be paid by the Petitioner, who had served him, and not out of the fund.

SIR R. MALINS, V.C.:—

Whatever may be the practice in other branches of the Court it has always been my practice, and I shall continue to act upon it until I find it otherwise decided by higher authority, to allow a person who is served with a Petition, and at the hearing claims no interest, his costs of appearance. I do not see why a person who is served is to judge whether or not he is unnecessarily served. I shall allow Mr. *Nolan* ten guineas for his costs, to be paid by the Petitioner, who must add the amount to his security.

Mr. *Glasse*, Q.C., and Mr. *Graham Hastings*, for *Churchill & Barry* (they also appeared for the Plaintiff), and Mr. *Osborne*,

(1) Page 43, 44.

V.-C. M. 1868 CLARK v. SIMPSON.

Q.C., and Mr. *Begg*, for *Simpson*, contended that they ought not to have been served, and asked for their costs.

Mr. *Chitty*, for Lord *Rivers*.

SIR R. MALINS, V.C.:—

I think that *Simpson* and *Churchill & Barry* were unnecessarily served. The Petition must be dismissed as against them, with costs to be paid by the Petitioner. I will reserve the question how those costs are ultimately to be borne.

Solicitors: Messrs. *Mackeson & Goldring*; Messrs. *Pawle, Lovesy, & Fearon*; Messrs. *Churchill & Barry*; Mr. *E. T. Lewis*; Messrs. *C. & J. Allen & Son*; Messrs. *Rickards & Walker*; Mr. *Sweetland*.

V.-C. M. 1868 *July* 1.

OSBORN *v.* OSBORN.

Partition—Sale—Costs—31 & 32 Vict. c. 40.

In a partition suit, where the Defendants were infants, the Court, on making a decree for sale under 31 & 32 Vict. c. 40, ordered the costs of all parties to be paid out of the estate.

THIS was a suit by the eldest of the four sons of *George Osborn*, who died in 1866 intestate, seised of property of gavelkind tenure, against the three younger sons, who were infants, two of them being under the age of fifteen years, for the purpose of having the property sold and the proceeds divided. The bill, which was filed before the passing of the 31 & 32 Vict. c. 40, prayed for a declaration that the costs of the Defendants were a charge upon their respective shares, and that it was for their benefit that such costs should be secured by a sale, without a partition, and that the entirety might be sold and the costs of the suit might be paid out of the proceeds, and it prayed in the alternative for a partition.

Mr. *Batten*, for the Plaintiff, said that the recent Act, 31 & 32 Vict. c. 40, enabled the Court to order a sale notwithstanding the

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disability of the Defendants, without resorting to the practice adopted in *Hubbard* v. *Hubbard* (1), of charging their costs on their shares, and that the Act also gave the Court the fullest discretion as to the costs.

Mr. *Ellis*, for the Defendants.

SIR R. MALINS, V.C., being of opinion that by reason of the nature of the disability of the Defendants, a sale would be more beneficial to all parties than a partition, ordered the property to be sold, and declared that the costs of all parties of the suit were to be a lien on the proceeds of the sale.

Solicitor for the Plaintiff: Mr. *Eustace Anderson, jun.*
Solicitors for the Defendants: Messrs. *Anderson & Son.*

In re BRIGHTON HOTEL COMPANY.

V.-C. M.
1868
June 27;
July 30.

Company—Winding-up—Discretion of Court—Creditor's Petition ordered to stand over—Companies Act, 1862, *ss.* 86, 91.

The Court is not bound *ex debito justitiæ* to make an immediate order to wind up a company upon the Petition of a creditor whose debt is admitted and not paid, but may, under the 86th and 91st sections of the *Companies Act*, 1862, order the Petition to stand over to enable the company to make arrangements for the payment of its debts, and the carrying on of its business, and will make such order where there is a reasonable hope of such arrangements being made.

THIS was a Petition for the winding up of the *Brighton Hotel Company, Limited*, a joint stock company formed and registered under the *Joint Stock Companies Act*, 1856, with a nominal capital of £100,000 in 20,000 shares of £5 each.

The Petitioner was a creditor of the company in respect of a debenture for £250, which fell due in April, 1868, and the holder of twenty shares in the company.

In opposition to the Petition an affidavit had been filed by three shareholders holding, in the aggregate, 1450 shares, one of

(1) 2 H. & M. 38.

V.-C. M. 1868 *In re* Brighton Hotel Company.

whom was the chairman of a committee of shareholders appointed by a general meeting of the company to inquire into its affairs, and make suggestions for its future management, who stated that in 1867 the company's business produced a nett profit of £7179 19*s.* 11*d.*, which was sufficient to pay the interest on all its debenture and mortgage debts, and to leave a small balance; that the receipts of 1868, up to the present time, had exceeded those of 1867; that there were no trade debts, except such as might be met by the current incomings of the business; that at a meeting of shareholders held on the 17th of June (the Petition having been presented on the 15th) a number of the shareholders had signed a subscription list for the purpose of providing the money to meet the debentures then due, provided that a new board of directors were appointed at a meeting to be held on the 1st of July then next, when the present board had promised to retire; that the deponents believed that a reduction of £3000 might be made in the annual expenditure; and that the company would be able to raise funds to pay off the debentures then due, and to provide for those falling due.

Another Petition to wind up the company had been presented on the 11th of June by a debenture holder in Vice-Chancellor *Giffard's* Court before this Petition was presented, and came on for hearing on the 20th of June, but was by consent ordered to stand over for three weeks.

Several actions had been commenced against the company. Two provisional liquidators, one of them being the secretary of the company, had been appointed upon the application of this Petitioner. It was stated at the Bar that £4 15*s.* per share of the company's capital had been called up.

Mr. *Karslake*, Q.C., and Mr. *J. N. Higgins*, for the Petitioner:—

The Petitioner, being a creditor whose debt is undisputed, is entitled to the winding-up order *ex debito justitiæ*: *Bowes* v. *Hope Life Assurance Society* (1). Actions have already been commenced against the company, and it is for the interest of all parties that the assets should be protected by a winding-up.

(1) 11 H. L. C. 389.

Mr. *Glasse*, Q.C., and Mr. *Everitt*, for the opposing shareholders:—

The 86th and 91st sections of the *Companies Act*, 1862, give the Court a wide discretion as to the order to be made on a winding-up Petition, and in all matters relating to the winding-up, and the *dicta* in *Bowes* v. *Hope Life Assurance Society* (1) were not intended to fetter that discretion. The great majority of the shareholders desire the company to go on, and there is reason to believe that arrangements will be made for paying off the debenture holders who refuse to renew their debentures. We therefore ask that the Petition may stand over for a month, and that the Court will direct a meeting of the shareholders to be held for the purpose of ascertaining their wishes.

Mr. *Fooks*, for the company.

Mr. *Peck*, for the other Petitioner, contended that if a winding-up order was made, it ought to be made on his Petition.

Mr. *Karslake*, in reply.

Sir R. Malins, V.C.:—

This is a Petition to wind up the *Brighton Hotel Company*, presented by *Thomas Green*, who is a debenture holder for £250, and a holder of twenty shares upon which £1 15*s*., it is stated, has been paid, and upon which there is a liability to pay 5*s*. more; he is the only person before me who is anxious to wind up the company. It is stated that there is another Petition before Vice-Chancellor *Giffard* asking the same relief; that Petition has been ordered to stand over for three weeks upon various grounds satisfactory to the mind of Vice-Chancellor *Giffard*. An affidavit has been filed by three gentlemen largely interested in the affairs of this company, Mr. *Mayall*, a shareholder for 100 shares, Mr. *Askew*, a shareholder for 1250 shares, and Mr. *Allenden*, also a shareholder for 100 shares; Mr. *Mayall* being the chairman of a committee of shareholders appointed to consider what is expedient to be done under the difficult circumstances in which the company is placed.

(1) 11 H. L. C. 389. 11 Jur. N.S. 643.

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I have before me this affidavit, which was filed on the 23rd of this month, and which there has been ample opportunity of replying to, but which has not been replied to. I must, therefore, take every statement in that affidavit to be correct; and from that affidavit it appears that although this company has considerable difficulties to contend with, its position is this: that it is not only able to pay its way, but that the result of its trading for the last year was to produce a clear profit of £7179 19*s.* 11*d.*; and that although it has debentures to the extent of £58,824, and mortgages to the extent of £50,000, it was enabled by the operations of the hotel to pay every farthing of its debenture and mortgage interest, and all its expenses, and to leave a small profit—that is after having paid all outgoings; and under these circumstances the question is, whether this is a case in which it is absolutely necessary that I should make an immediate order to wind up the company. It has been urged upon me that I am bound to do so because Lord *Cranworth*, in a case in the House of Lords, said that when a debt is established and not satisfied, it is the duty of the Court to direct the winding-up (1). I do not intend to go against anything Lord *Cranworth* has done, but Lord *Cranworth* was only addressing himself to the case before the House of Lords, which was, whether a winding-up order should be made upon the petition of a creditor whose debt was not proved or admitted. He cannot have intended that the 86th and 91st sections of the *Companies Act*, 1862, should be erased from the Act? I have no person asking me to wind up this company except the Petitioner. I have before me shareholders to an enormous amount asking me not to wind it up. I have every shareholder except the Petitioner objecting to the winding-up, and the company say they are making arrangements which will probably put them as to finances in a sound position, by a diminution of their expenditure in carrying on the hotel; and they are about to adopt other means—their difficulties having made it necessary to consider what is best to be done—and I think they will be able to take steps which will enable them to carry on this large concern with, at all events, some degree of success. Now, the question before me is not whether I shall make an order to wind up this

(1) 11 H. L. C. 402.

company ultimately, but whether I shall exercise the very large discretion reposed in me by the 86th and 91st sections, of giving this company an opportunity, by ordering this Petition to stand over for a month, of considering how they will raise money to meet their difficulties, whether they will pay this gentleman off, whether they will themselves voluntarily wind up, or whether they will make such arrangements as will enable them successfully to carry on this concern. I have no doubt that I am imperatively called upon to give them that opportunity, and that there never was a case more absolutely calling for the exercise of the discretion of the Court than this. Although it is very true this gentleman's debenture fell due in April, and no doubt he ought to have had his money, yet I do not think the money is of any very great importance to him, and it is not on account of that that he presses for the order. If I made an order for the immediate winding up of the company that would not give to him his £250. Therefore regarding the interest of every one, except this Petitioner, I feel bound to give the time asked for, and I am equally clear that it is to the interest of this Petitioner himself that I should give the time asked for.

Therefore, on these grounds, satisfied as I am that the Petition ought to stand over, and endeavouring as I do to take a view which will not wantonly and unnecessarily lead to the sacrifice of property, but have regard to the interest of every one who has embarked in this company, I shall certainly, in this case, and in all similar cases when there is a hope of some reasonable arrangement being made, give those who desire to make the effort an opportunity of doing so. The Petition will therefore stand over till Friday, the 24th of July.

Mr. *Fooks* then moved *ex parte* for injunctions staying the actions commenced against the company.

The VICE-CHANCELLOR granted the injunctions.

July 30. The other Petition having been transferred to this branch of the Court, an order was now made for discharging the

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provisional liquidators, and staying all further proceedings on the Petitions, upon payment of the debts and costs of the Petitioners, and the costs and remuneration of the liquidators.

Solicitors for the Petitioners: Messrs. *Lewis, Munns, & Co.*; Messrs. *Hooper, Peck, & Maynard.*

Solicitors for the Respondents: Messrs. *Gray, Johnston, & Mounsey*; Messrs. *Monckton & Monckton.*

V.-C. M. 1868 *Feb.* 11, 12; *March* 21.

In re OVEREND, GURNEY, & CO. *Ex parte* SWAN.

Bills taken up supra Protest for the Honour of the Drawer—Right to sue the Acceptor—Accommodation Bills.

The indorsee or transferee for value of a bill of exchange after dishonour has a right to recover against the acceptor, whether the bill was given for value or not, unless there be an equity attached to the bill itself, amounting to a discharge of it; and the right of set-off is not an equity which attaches to the bill.

A person who takes up a bill *supra protest* for the benefit of a particular party to the bill succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon the bill, except that he discharges all the parties subsequent to the one for whose honour he takes it up, and that he cannot himself indorse it over.

5 Ch 360
11 Eq 483
19 Eq 307

THIS was a summons taken out on behalf of *Patrick D. Swan*, a flax spinner at *Kirkaldy*, in *Scotland*, and also on behalf of certain other flax spinners, all of whom are, for convenience and for the purposes of the present question, hereafter included under the name of "Mr. *Swan*," calling upon the official liquidator of *Overend, Gurney, & Co., Limited*, to shew cause why Mr. *Swan* should not be admitted a creditor of the said company for the sum of £26,545, and interest, or for such other amount as the Court should determine, and why he should not be paid the amount of dividends payable upon such sum.

The following statement of facts was admitted on both sides for the purpose of obtaining the opinion of the Court upon the questions of law which had arisen between the parties:—

The claim of Mr. *Swan* arises upon and in respect of several

bills of exchange drawn by certain persons carrying on business at *St. Petersburg* under the title of "*Cattley & Co.*," upon *Overend, Gurney, & Co.*, amounting in the whole to £26,545, and negotiated by *Cattley & Co.* in *St. Petersburg*, and afterwards accepted by *Overend, Gurney, & Co.*, and dishonoured by them at maturity, and then taken up and paid by Mr. *Swan supra protest* for honour of the drawers, under the circumstances hereinafter mentioned.

Messrs. *Cattley & Co.* have for many years carried on the business of export and general merchants at *St. Petersburg*, and were in the habit of securing in the autumn and winter of each year large supplies of Russian produce from the interior of the country to be ready in *St. Petersburg* for shipment to *Great Britain* upon the opening of the navigation in the spring of the succeeding year. These shipments were then made by *Cattley & Co.* in execution of orders which in the meantime had been collected by them during the said autumn and winter by their agents in the *United Kingdom*. Messrs. *Robinson & Fleming* acted as the agents in *London* for Messrs. *Cattley & Co.*, and were in the habit of obtaining from various flax and other manufacturers in *Great Britain* orders, which they forwarded to Messrs. *Cattley & Co.* in the autumn and winter of each year, for large quantities of flax and other produce to be shipped in the succeeding spring, and Messrs. *Cattley & Co.* immediately on the receipt of these orders drew bills upon the various British manufacturers for amounts approximating as nearly as could be estimated to the full invoice price of the goods ordered. This course of business enabled Messrs. *Cattley & Co.*, by the negotiation of these drafts, or by other banking arrangements, to make advances to the flax growers and other producers, and to complete the payments for the goods upon their delivery in *St. Petersburg*. For the purpose of carrying on this and other business with *Great Britain*, and obtaining the necessary banking facilities for such purpose, Messrs. *Cattley & Co.* entered into arrangements with Messrs. *Overend, Gurney, & Co.* to act as their bankers in *London*, and in accordance with these arrangements Messrs. *Cattley & Co.* were in the habit of drawing bills at *St. Petersburg* from time to time upon *Overend, Gurney, & Co.* in *London*, at some months' date, at such times and to such amounts as their business might

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require, whilst they on their part remitted to *Overend, Gurney, & Co.* all bills upon *Great Britain* which came into their possession in the course of business. By this means *Cattley & Co.* kept *Overend, Gurney, & Co.* from time to time in funds to meet the acceptances which they had come under for *Cattley & Co.* as they arrived at maturity. It was no part of this arrangement, nor was it, in fact, the course of business between them, for *Cattley & Co.* to make remittances to meet specific acceptances, but it was understood and so arranged that *Overend, Gurney, & Co.* were to be kept out of cash advances. In consideration of the transaction of this business *Cattley & Co.* paid *Overend, Gurney, & Co.* one-half per cent. upon the total amount of acceptances which the latter came under for them as above stated. In addition to this arrangement, it was further agreed that *Cattley & Co.* should be allowed, in consideration of an additional commission, a margin for overdrawing to the extent of £10,000 in excess of the remittances forwarded by them for the purpose of meeting the acceptances as before mentioned. By this means, and in consideration of such extra commission, *Cattley & Co.* had always a current credit for drawing to the extent of £10,000 over and above the amount of remittances to be forwarded by them to meet the acceptances then maturing. On the 10th of May, 1866, the date of the stoppage of the firm of *Overend, Gurney, & Co.*, the latter were under acceptances for *Cattley & Co.*, under the foregoing arrangements, to the amount of £26,545. These bills had been drawn, and would have become due at the respective dates set forth in a schedule. At the date of the petition for winding-up *Overend, Gurney, & Co.* had in hand remittances in cash and bills equal in nominal value to nearly £13,000, but they received no further remittances from *Cattley & Co.*, and of these bills so remitted £6200 were not paid at maturity, and remained still unpaid, leaving in the hands of *Overend, Gurney, & Co.* a cash balance of £6911 3*s.* 2*d.* The bills, amounting to £26,545, were all duly presented for payment by the various holders upon *Overend, Gurney, & Co.*, and dishonoured, and they were duly protested for non-payment. Amongst the British manufacturers who were in the habit of giving orders to *Cattley & Co.* was Mr. *Swan*, and in the autumn of 1865 he (and also certain friends of his who are included and referred to in all references to

Mr. *Swan*) had given orders through Messrs. *Robinson & Fleming* to *Cattley & Co.* for very large quantities of flax to be shipped in the following spring. For the price of these intended shipments *Cattley & Co.*, in accordance with their course of business as above stated, immediately drew upon Mr. *Swan* for the full estimated amount of the invoice price of these goods, and which amount, for the purposes of the present question, is to be taken to have been the full amount. These drafts were remitted by *Cattley & Co.* to *Overend, Gurney, & Co.*, and were accepted by Mr. *Swan*, and were credited in account by *Overend, Gurney, & Co.* to *Cattley & Co.*, and duly paid at maturity. Mr. *Swan* never had any current or open account with *Cattley & Co.*, and his transactions with them were limited entirely to the orders for flax, which were at once paid for as above mentioned. At the date of the suspension of *Overend, Gurney, & Co.*, a very large quantity of the flax ordered by Mr. *Swan* from *Cattley & Co.*, for which he had given his acceptances, still remained at *St. Petersburg*, in the possession of *Cattley & Co.*, ready for shipment. When *Overend, Gurney, & Co.* suspended payment on the 10th of May, 1866, the news of their suspension was at once forwarded to *St. Petersburg*, and *Cattley & Co.* immediately upon receipt of the news telegraphed to Messrs *Robinson & Fleming*, their agents, stating, as the fact was, that if *Overend, Gurney, & Co.'s* acceptances to their drafts were returned to *St. Petersburg* dishonoured, they would be compelled to stop payment, and in that event the holders of the dishonoured bills might have stopped all the flax and other produce about to be shipped. Thereupon Messrs. *Robinson & Fleming* communicated with Mr. *Swan* with a view to his taking any steps for the protection of his interests he might be advised in order to prevent the shipment of the flax purchased and paid for by him as aforesaid being stopped. Mr. *Swan*, upon receipt of this news, and on the 12th of May, 1866, came up to *London*, and having taken advice upon his position in the matter, determined, for the protection of his own interests, and to prevent the shipment of the flax being stopped, as it might and would have been if the bills had been returned dishonoured to *St. Petersburg*, to take up the acceptances in the event of their dishonour by *Overend, Gurney, & Co.*, *supra protest*, and he accordingly gave instructions to Messrs. *Robinson &*

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Fleming to take the necessary steps to protect his interests, and supplied them with the necessary funds to take up the said acceptances for him. When these acceptances became due they were dishonoured by *Overend, Gurney, & Co.*, and were duly protested by the holders for non-payment, and were then paid by Mr. *Swan supra protest,* and handed to him together with the protest.

Messrs. *Drake, Kleinwort, & Co.*, who were the holders of these acceptances on the 12th of May, 1866, and to whom the same had been indorsed by their correspondents in *St. Petersburg* for presentation on *Overend, Gurney, & Co.*, and for collection, would not have permitted Mr. *Swan* to have taken up the said acceptances, and to have held their *St. Petersburg* correspondents still liable upon their indorsements, and would only agree to his interfering after the bills were dishonoured. Mr. *Swan* (including also his friends) provided money for taking up the acceptances out of his own resources and on his own account, and for the sole purpose of protecting his own interests only, and not for the benefit, nor by the authority of, nor as the agent for, *Cattley & Co.*; and he had not at that time, nor has he since, had any money, property, effects, means, or credits of any kind belonging to *Cattley & Co.* applicable to the purpose, and he took the bills up *bonâ fide* for his own benefit, and to protect his own interest only. *Cattley & Co.* were, it is believed, at the time of the maturity of the acceptances, and have still continued to be, unable to meet their liabilities, although they have not formally and publicly suspended payment. Mr. *Swan,* however, after he had taken up the said acceptances, applied to them for reimbursement, but was informed by them, as the fact was, that they were unable to provide the money, and they have never been able to do so, and Mr. *Swan* has not been in any way repaid.

It is agreed that the question in this case, and with reference to which the above facts have been stated, is, whether Mr. *Swan* is entitled to claim against *Overend, Gurney, & Co.*, as a creditor, for any amount of the said acceptances, or whether he is entitled only to stand in the same position as the drawers, and the Court is to be at liberty to draw inferences from the above statement of facts.

Mr. *Watkin Williams*, and Mr. *W. F. Robinson*, for the claimant, Mr. *Swan* :—

The course of dealing is fully set forth in the state of facts agreed upon between the parties. When orders were sent out to *Cattley & Co.*, of *St. Petersburg*, for goods by *Swan* and his friends, bills were drawn by *Cattley & Co.* upon those who had ordered the produce, and the bills were accepted by them. These bills were then sent to *Overend, Gurney, & Co.* for collection, and *Cattley & Co.* drew upon *Overend, Gurney, & Co.*, with whom *Cattley & Co.* had a credit, to the amount of the English bills, and they had a further credit for overdrawing to the extent of £10,000, which was to be paid for by a commission agreed upon between them. *Swan* knew nothing of this arrangement, and had nothing to do with it. All he knew was, that if the bills were not taken up *Cattley & Co.* would stop payment, and the goods which were in the hands of *Cattley & Co.* would be taken by their Russian creditors, and would not be sent to *England*, the effect of which would be to damage his trade to a great extent. Under these circumstances, he took advice as to the course he ought to pursue, and the method adopted by him was to wait until the bills were dishonoured, and then to take them up *supra protest* for the honour of the drawer. He might have taken them up before they arrived at maturity, but this was objected to because it would have thrown a responsibility upon the correspondent bankers at *St. Petersburg*. *Swan* took the bills up, not simply for the honour of *Cattley & Co.*, but also for his own benefit.

The contention on the part of the official liquidator is founded upon the case of *Ex parte Lambert* (1), in which the Lord Chancellor (Lord *Erskine*) is reported to have said:—"A bill, accepted, being dishonoured, is taken up for the honour of the drawer by the Petitioner. The effect is, that he has a clear right against the drawer. So he has a right to stand in the place of the drawer; but cannot make a title stronger than that of the drawer, and oust the assignees of the bankrupts of the defence which they would have against him." This decision can only be supported on the supposition that the person who took up the bill was the agent of the drawer, and

(1) 13 Ves. 179.

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stood in the same position, but *Swan* was in a very different position, since it was for his own benefit that he took up the bills.

The text-writers have all accepted the case of *Ex parte Lambert* (1) as law, but it has been overruled in subsequent cases.

It is admitted that *Cattley & Co.* could not have recovered upon these bills more than the amount of the balance due to them in the hands of *Overend, Gurney, & Co.* *Swan* stood in the position of indorsee for value after maturity, and as such he is entitled to recover against the acceptor. This would have been the case even if the bills were accommodation bills, if *Swan* had given value.

It was decided in *Bickerdike* v. *Bollman* (2), that the drawer of an accommodation bill is not entitled to notice of its dishonour, but these were bills of which *Cattley & Co.* were entitled to notice, as is laid down in *Blackhan* v. *Doren* (3), *Hammond* v. *Dufrene* (4), and *Thackray* v. *Blackett* (5).

A man is entitled to discount a bill on the credit of the acceptor, without having any knowledge of the person presenting it, and he can recover upon it, provided he has given value, and there is honesty in the transaction. This principle was laid down differently in *Gill* v. *Cubitt* (6); but the doctrine was subsequently set right in *Raphael* v. *Bank of England* (7), and other cases, reversing the rule in *Gill* v. *Cubitt*.

In this case *Swan* was an indorsee for value, and in this lies the distinction from some of the authorities. In *Brown* v. *Davies* (8), where a promissory note was indorsed to the Plaintiff after it became due, it was held that the maker was entitled to go into evidence to shew that the note was not for value as between him and the payee; and in *Tinson* v. *Francis* (9) it was held that an indorsee of a promissory note for value, who had received the note after it became due from an indorser who had not given value, could not sue the maker. But these cases were much commented upon in *Sturtevant* v. *Ford* (10), where the Judges decided, upon the authority of *Charles* v. *Marsden* (11), and *Stein* v. *Yglesias* (12),

(1) 13 Ves. 179.
(2) 1 T. R. 405.
(3) 2 Camp. 503.
(4) 3 Ibid. 145.
(5) Ibid. 164.
(6) 3 B. & C. 466.
(7) 17 C. B. 161.
(8) 3 T. R. 80.
(9) 1 Camp. 19.
(10) 4 Man. & G. 101.
(11) 1 Taunt. 224.
(12) 1 C. M. & R. 565.

that a plea by the acceptor of a bill to an action by the indorsee, that the bill was accepted before it became due, at the request and for the accommodation of *J. S.*, and without any value or consideration for acceptance, or for the payment, and that the bill was indorsed to the Plaintiff after it became due, was bad. *Atwood* v. *Crowdie* (1), and *Holmes* v. *Kidd* (2), are consistent with the law as laid down in *Charles* v. *Marsden* (3).

An indorsee of a bill for value after dishonour has as good a title against the acceptor as if it had been indorsed before maturity, and the right to set off as between *Cattley & Co.* and *Overend, Gurney, & Co.* cannot be pleaded against *Swan*, the holder for value, such set-off not being an equity attaching to the bill itself. These points are settled by *Oulds* v. *Harrison* (4), *Burrough* v. *Moss* (5), *Lazarus* v. *Cowie* (6), and *Holmes* v. *Kidd*.

Then with regard to the text-books. It is laid down in *Byles* on Bills of Exchange (7), "that any party to a bill of exchange may pay for honour; so may a mere stranger, without any previous request or authority from the party for whose honour he pays. It is clear there can be no payment for honour till the bill is dishonoured by non-payment, and a protest is essential. The most advantageous course to be pursued by a man desiring to protect the credit of any party to a dishonoured bill is simply to pay the amount to the holder, and take the bill as an ordinary transferee." But in some cases, he says, a payment *supra protest* may become essential. He continues: "The party paying *supra protest* has also his remedy against the acceptor."

The subject is treated in the same way in other books: *Beawes' Lex Mercatoria* (8); *Pothier's* General Works (9); *Chitty* on Bills of Exchange (10); *Story* on Bills (11); *Pardessus'* Treatise (12); *Bayley* on Bills (13); *Malynes' Lex Mercatoria* (14).

(1) 1 Stark. N. P. C. 483.
(2) 3 H. & N. 891. 5 Jur. (N.S.) 296
(3) 1 Taunt. 224.
(4) 10 Ex. 572.
(5) 10 B. & C. 558.
(6) 3 Q. B. 459.
(7) 9th Ed. ch. 21, p. 260.
(8) Vol. i. p. 569 (quarto Ed.), ss. 50, 53, 54, 56.
(9) Vol. v. p. 285, pt. 1, ch. 4, art. 5.
(10) Page 509.
(11) Ch. 8, p. 266.
(12) Page 500, part 3, cap. 7, s. 408, Ed. 1856.
(13) Page 321.
(14) (London fol. Ed.) ch. 6, p. 265.

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Upon these authorities we say, first, that the Plaintiff is in the same position as an indorsee for value, and can successfully sue *Overend, Gurney, & Co.* under the circumstances of this case. And, secondly, that an indorsee may sue the acceptor, notwithstanding he knows it is an accommodation bill, if he gives value for it. It matters not whether *Overend, Gurney, & Co.* got value for the bills or not. *Swan*, at any rate, gave value. There is no reason why *Overend, Gurney, & Co.* should benefit by *Swan's* payment. The proper mercantile way of dealing with the bills was to take them up, as the Plaintiff did, after being protested.

Mr. *Roxburgh*, Q.C., Mr. *Ferrers*, and Mr. *J. C. Mathew*, for the official liquidator:—

At the time of the stoppage of *Overend, Gurney, & Co.* the amount due to *Cattley & Co.* upon the account between them was £6911 3*s.* 2*d.*, and this is the only sum which Mr. *Swan*, the holder of the bills, can claim against the estate of *Overend, Gurney, & Co.* The bills were, in effect, accommodation bills, and *Cattley & Co.* could only have recovered against *Overend, Gurney, & Co.* the sum due on taking the accounts between them. *Swan* having taken up the bills *supra protest* for the honour of the drawer, can stand in no better position than the drawer. This rule is laid down distinctly in *Ex parte Lambert* (1), where the facts were similar to these. It is admitted that *Swan* took up the bills for the honour of the drawer, that is, for his benefit, he cannot, therefore, be heard to say that he took them for his own benefit.

It is said that *Swan* has placed himself in the position of indorsee for value; but this cannot be said in the present case, since one of two innocent parties must suffer. If *Overend, Gurney, & Co.* are held liable to pay, then they will do so without having received value, and the same may be said of Mr. *Swan*. If *Swan* has a right to sue, he must have the same right against all the indorsers. *Beawes* (2) says: "He that pays a bill *supra protest* immediately succeeds the possessor in the right and title thereto;" but if he has the right of an indorsee, he may sue the other indorsees; that shews that the right of the person intervening for honour is not the same as the indorsee. In *Pardessus* the same principle is laid

(1) 13 Ves. 179. (2) Vol. ii. p. 570, s. 54.

down (1); and also in *Dana's Kentucky* Reports (2). *Ex parte Lambert* (3) has never been questioned, but the principle is laid down in all the text-books, and even in Mr. Justice *Byles'* last edition (4). If the bills had been transferred from *Drake & Co.*, the right to sue would have attached, but not so when taken up *supra protest* for honour of the drawer. The only benefit given *Swan* is such as the drawer had, and not such as an indorsee would have had. In *Bayley* on Bills (5) the distinction is laid down between an indorsee for value after dishonour, and a person intervening for honour. In *Sturtevant* v. *Ford* (6), the view taken by the Judges, of the equity of the case, is shewn. *Mertens* v. *Winnington* (7) decides that he who intervenes for the honour of the indorsee, and not the drawer, becomes as indorsee of the bill, and entitled to all remedies against the other parties to the bill. But if he takes it up for the honour of the drawer, he can stand in no better position than the drawer. Bills are just as much negotiable after dishonour as before; but after dishonour the bill becomes disgraced, and therefore it is taken up subject to liabilities. The rights of a holder by negotiation are greater than one who takes up a bill for the honour of a drawer.

The question as to the equities affecting a bill is discussed in *Holmes* v. *Kidd* (8). A person taking an overdue bill takes it subject to its equities. If *Swan* had known that *Cattley & Co.* had not supplied money to *Overend, Gurney, & Co.*, he would have been bound by the equities between *Cattley & Co.* and *Overend, Gurney, & Co.* There is nothing in the equity of this case to entitle *Swan* to say that he is in the position of *quasi* indorsee for value; there is, in fact, nothing more than is to be found in all cases where a bill is taken up for the honour of the drawer.

[The following books were also cited: *Nueyer* on Bills (9); *Massé* on Bills (10).]

Mr. *Williams*, in reply:—

The position of Mr. *Swan* is not that of an accommodation

(1) Page 500.
(2) Page 35.
(3) 13 Ves. 179.
(4) Page 229.
(5) 6th Ed. p. 321.
(6) 4 Man. & G. 101, 104.
(7) 1 Esp. 113.
(8) 3 H. & N. 891. 5 Jur. N.S. 296
(9) 2nd Ed. 1851, vol. i. s. 593.
(10) 2nd Ed. 1862, vol. iv. p. 2078.

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acceptor. The payment by *Swan* operated in discharge of all the indorsees subsequent to the drawer for whose honour he took it up: *Jones* v. *Broadhurst* (1). It has been decided that the effect of such a payment would not discharge the acceptor: *Cook* v. *Lister* (2); *Johnson* v. *Royal Mail Steam Packet Company* (3). *Swan* is not in the ordinary position of an indorsee, but he is indorsee according to the custom of merchants. He may sue the acceptor, but not the drawer, because he took the bill up *supra protest* for the honour of the drawer. The custom of merchants is set out in *Ludwicke*. *Swan* is in the same position as if he had taken the bill by indorsement from *Drake & Co.*, except that he cannot transfer it to any one else, nor can he sue the drawer, because of his protest. If *Swan* had not paid the money, *Overend, Gurney, & Co.* must have paid some one.

All the codes of law in foreign countries have a rule to the effect now contended for, except in *India*, where the recent code is silent upon the subject. They all go to this, that one who takes up a bill *supra protest* for honour is in the position of an indorsee.

Mar. 21. Sir R. Malins, V.C.:—

Upon the state of facts agreed to between the parties there is no dispute that if the bills in question, amounting to £26,545, had remained in the hands of *Drake, Kleinwort, & Co.*, or, rather, of the *St. Petersburg* correspondents who were the purchasers of them, the estate of *Overend, Gurney, & Co.* must have paid the full amount. But it is contended by the official liquidator of that estate, that the fortunate accident of Mr. *Swan* having taken up the bills under the circumstances stated, has wholly discharged that estate from all liability to pay anything on account of them beyond the £6941 3*s.* 2*d.*, the balance belonging to *Cattley & Co.* which remained in the hands of *Overend, Gurney, & Co.* This contention is rested on the ground that the bills, as between *Cattley & Co.* and *Overend, Gurney, & Co.*, were virtually accommodation bills, upon which the former could only have recovered the balance actually

(1) 9 C. B. 173. (2) 13 C. B. (N.S.) 543.

(3) Law Rep. 3 C. P. 38.

due to them on the result of the accounts between the two firms; and that *Swan* having, in form, taken up the bills for the honour of the drawers, must stand in their shoes, and can have no better right to recover than they would have had if the bills had been thrown back upon them. It is admitted by the counsel for Mr. *Swan*, that if the bills had been thrown back upon *Cattley & Co.* they could not have recovered more upon them than the balance due on the result of the accounts between the two firms, viz., £6911 3*s.* 2*d.*

The resistance of the official liquidator to pay these bills is mainly rested upon the general rule supposed to be established in *Ex parte Lambert* (1), that a person who takes up a bill after dishonour for the honour of the drawer, or for any other object, can only stand in the place of the drawers, and can have no better right of recovery upon it against the acceptor than the drawer would have had. The short facts in *Ex parte Lambert* were, that a firm of *Adams & Co.*, at *New York*, drew upon a firm in *London* two bills of exchange; that the Petitioners, *Lambert & Co.*, being interested in the welfare of the American house, as to one of the bills before it arrived at maturity, and as to the other after maturity, took them up, not under protest, but simply took them up and paid the money to save the discredit of the drawers in having the bills returned to *New York*. The Lord Chancellor, Lord *Erskine*, decides the matter in these few words: "I continue of the opinion I expressed yesterday. Upon this affidavit there is no doubt that if *Adams & Co.* had themselves been Plaintiffs in an action, the acceptors of these bills might, as against them, have insisted that the bills were drawn merely for the accommodation of the drawers; and they had no effects; though that would not have been an answer to an indorsee for valuable consideration without notice. Then what is this case? A bill accepted being dishonoured, is taken up for the honour of the drawer by the Petitioner. The effect is, that he has a clear right as against the drawer. So he has a right to stand in the place of the drawer; but cannot make a title stronger than that of the drawer; and oust the assignees of the bankrupts of the defence which they would have against him." Therefore the broad rule laid down by Lord *Erskine* is, that he who

(1) 13 Ves. 179.

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takes up a bill after dishonour cannot, under any circumstances, be in a better position than the drawer of the bill. If, therefore, the bill is given as accommodation, or without effects, inasmuch as the drawer cannot recover, the holder from the drawer cannot do so.

It may not make any difference in the result, but it must be remarked that these bills were not, in the proper sense of the word, accommodation bills, for it is clear that the drawer of a mere accommodation bill is not entitled to notice of its dishonour—that is decided in *Bickerdike* v. *Bollman* (1), and is a recognised rule. It is equally clear that these were bills of which *Cattley & Co.*, the drawers, were entitled to notice of dishonour.

In *Blackhan* v. *Doren* (2), the action was against the Defendant as a drawer of a bill of exchange for £250, dated *Kingston, Jamaica,* October 1st, 1809, on Messrs *Hunter & Co.*, in *London,* at six months after sight. This was refused acceptance. To excuse the sending of notice of the dishonour of the bill to the Defendant, the Plaintiff called a clerk of the drawers, who stated that when it was presented they had produce in their hands belonging to him to the amount of about £1500, but that he owed them £10,000 or £11,000, and that they had appropriated the effects in their hands to go in satisfaction of this debt. Lord *Ellenborough* said:—"if a man draws upon a house with whom he has no account, he knows that the bill will not be accepted, he can suffer no injury from want of notice of its dishonour, and therefore he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee"—in this case, of course, upon the statement, *Cattley & Co.* had a fluctuating balance in the hands of *Overend, Gurney, & Co.*—"There notice is peculiarly requisite. Without this, how can the drawer know that credit has been refused to him, and that his bill has been dishonoured? It is said here, that the effects in the hands of the drawees were all appropriated to discharge their own debt; but that appropriation should appear by writing, and the Defendant should be a party to it. I wish that notice had never been dispensed with, and then we should not have been troubled with investigating accounts between drawer and drawee. I certainly will not relax the rule still farther—which I should do if I were to hold that notice was unnecessary in the

(1) 1 T. R. 405. (2) 2 Camp. 503, 504.

present instance." *Hammond* v. *Dufrene* (1) was an action on a bill of exchange for a certain amount drawn by the Defendant and accepted by Messrs. *Dufrene & Penny*, and payable three months after date. There the payment of the bill was resisted on the ground that notice of its dishonour had not been given. Lord *Ellenborough* again lays down the rule thus:—"I think the drawer has a right to notice of the dishonour of a bill, if he has effects in the hands of the acceptor at any time before it becomes due. In that case he may reasonably expect that the bill will be regularly paid, and he may be prejudiced by receiving no notice that it is dishonoured. I am aware that the inquiry has generally been as to the state of accounts between the drawer and drawee when the bill was drawn or accepted; but I conceive the whole period must be looked to from the drawing of the bill till it becomes due, and that notice is requisite if the drawer has effects in the hands of the drawee at any time during that interval. Therefore, if the Defendant in this case paid a sum of money for Messrs. *Dufrene & Penny*" —which it appeared by the facts he did—"before the 28th of July, you must prove that he had due notice it was not paid on that day by the acceptors."

This point may be considered as finally settled by another case of *Thackray* v. *Blackett* (2), where the same point was raised, and where Lord *Ellenborough* says:—"It is well settled that the insolvency or bankruptcy of the acceptor does not dispense with due notice of the dishonour of the bill being given to the drawer." Then the report states that "in the ensuing term the Attorney-General was refused a rule to shew cause why there should not be a new trial, all the Judges being of opinion that the Defendant was entitled to notice of the dishonour." That may be considered as having put the point at rest. In this case, therefore, it being admitted that there was a fluctuating balance belonging to the drawers in the hands of *Overend, Gurney & Co.*, and that they finally had the balance of between £6000 and £7000 in their hands when they stopped, it necessarily follows that these were bills of which *Cattley & Co.* were entitled to receive notice of dishonour, and were not in the strict sense of the word accommodation bills. The general proposition that a person who takes an accommodation

(1) 3 Camp. 145, 146. (2) 3 Camp. 164, 165.

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bill after it has been dishonoured, cannot be in a better situation than the drawer as against the acceptor, cannot now be maintained. It was admitted by Mr. *Roxburgh*, in his argument for the official liquidator, that the law is now settled that an indorsee for value of an accommodation bill after dishonour can recover against the acceptor, though the drawer himself could not have done so; and the authorities on that point most distinctly support that admission. The contrary was certainly formerly held, and it may be considered that *Ex parte Lambert* (1) was supported by the current of authority at the time it was decided. In *Tinson* v. *Francis* (2) Lord *Ellenborough* uses this expression (this being in 1807, the decision of Lord *Erskine* being 1806):—"After a bill or note is due it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be incumbered." The same doctrine is also laid down in *Brown* v. *Davies* (3), decided by Lord *Kenyon*, Mr. Justice *Buller*, and the other distinguished Judges of the Court of Queen's Bench at that time.

This, however, is distinctly overruled by the authorities commencing in the following year, and uniform down to the present time. In *Charles* v. *Marsden* (4), which was a case decided in 1808, only two years after the decision of Lord *Erskine* in 1806, the marginal note correctly states the decision: "It is not, of itself, a defence to an action by the indorsee of a bill of exchange to plead that it was accepted for the accommodation of the drawer, without consideration, and was indorsed over after it became due." Sir *James Mansfield*, in giving judgment in this case, says:—"It is not necessarily to be inferred because it was an accommodation bill that there was an agreement not to negotiate it after it became due; but if there was such an agreement it was the Defendant's own fault that the bill was outstanding; for even supposing that the drawer had undertaken to provide for the payment when the bill became due, the acceptor"—the acceptor here was sued by an indorsee after maturity—"had a right to require that it should be given up. It happened through his permission, therefore, if the bill gave the

(1) 13 Ves. 179.
(2) 1 Camp. 19.
(3) 3 T. R. 80.
(4) 1 Taunt. 224, 225.

drawer any power to delude the indorsee. None of the cases cited go so far as to support this plea." Mr. Justice *Lawrence* takes the same view.

In *Sturtevant* v. *Ford* (1) this point came very distinctly for decision. The marginal note in this case states the decision: "A plea by the acceptor of a bill to an action by the indorsee, that the bill was accepted before it became due, at the request and for the accommodation of *J. S.*, and without any value or consideration for the acceptance or for the payment, and that the bill was indorsed to the Plaintiff after it became due, is bad." Lord Chief Justice *Tindal* expresses that very clearly; and also Mr. Justice *Coltman*. Mr. Justice *Cresswell* observed: "It is said that the indorsee of a bill which is over-due takes it subject to all the equities. Perhaps a better expression would be"—and that is an expression confirmed by every subsequent authority—"that he takes the bill subject to all its equities"—that is, the equities of the bill, not the equities of the parties.—"That brings it to the question whether this is an equity which attaches to the bill. In *Charles* v. *Marsden* (2) the Court said that there was no reason why a bill should not be negotiated after it became due, unless there was an agreement for the purpose of restraining it. *Atwood* v. *Crowdie* (3) is consistent with the law as laid down in *Charles* v. *Marsden*."

Stein v. *Yglesias* (4), which is an earlier case than the one I have just mentioned, is precisely to the same effect, namely, that a plea that the bill being an accommodation bill was passed with notice of that fact to the indorsee after maturity, is bad. The case of *Oulds* v. *Harrison* (5) is also important for another point which I shall have to advert to. The indorsee of an over-due bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due; but he does not take it subject to claims arising out of collateral matters, such as the statutory right of set-off. That is laid down by Mr. Baron *Parke*. The case is somewhat long; but I will read one passage from the judgment:—"It must be considered as entirely settled by the case of *Burrough* v. *Moss* (6), that the indorsee of an-over due bill takes it subject to

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(1) 4 Man. & G. 101.
(2) 1 Taunt. 224, 225.
(3) 1 Stark. N. P. C. 483.
(4) 1 C. M. & R. 565.
(5) 10 Ex. 572, 578.
(6) 10 B. & C. 558.

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all the equities that attach to the bill itself in the hands of the holder when it was due, as, for instance, the payment or satisfaction of the bill itself to such holder, or where the title of such holder was only to secure the balance of an account due, as seems to have been the case in *Collenridge* v. *Farquharson* (1), but the indorsee does not take it subject to claims arising out of collateral matters, as the statutory right of set-off, which is merely a mode of preventing multiplicity of actions between the same parties." The same doctrine will be found in *Lazarus* v. *Cowie* (2). That I do not refer to particularly, but the rule is there equally distinctly laid down. Many others might be cited, and they are perfectly uniform. These authorities have settled the law that an indorsee of a bill of exchange for value after its dishonour has as good a title against the acceptor as if it had been indorsed to him before maturity, unless there is an equity attached to the bill itself; and they also shew that the right of set-off as between the acceptor and the drawer is not an equity attached to the bill, which can be enforced against the indorsee. The two cases of *Sturtevant* v. *Ford* (3) and *Oulds* v. *Harrison* (4) are authorities against the right of the acceptor to plead a set-off against the drawer as a defence to the action upon the bill by the transferee of it after dishonour. The same point was, if possible, more distinctly decided in that case which I have already mentioned, *Burrough* v. *Moss* (5), which is a remarkably strong application of the rule that a set-off as between the drawer and acceptor cannot be pleaded against the holder of the bill who became so after its dishonour.

These cases having established that the right of set-off is not an equity attached to the bill itself, the case of *Holmes* v. *Kidd* (6) shews very distinctly what an equity attached to the bill itself is. In that case the acceptor had accepted a bill of £300, depositing with the drawer certain canvas, which he was to be at liberty to sell as the means of providing for the bill. The bill was indorsed when over-due to the Plaintiff, and afterwards the canvas was sold by the drawer, but did not wholly pay the bill. The question was, whether the indorsee could recover. Here Mr. Justice *Erle* said:

(1) 1 Stark. N. P. C. 259.
(2) 3 Q. B. 465.
(3) 4 Man. & G. 101.
(4) 10 Ex. 572.
(5) 10 B. & C. 558.
(6) 3 H. & N. 891.

"The question is, whether the receipt of the money by the drawer is a bar to this action. The Plaintiff took the bill subject to the equities affecting it. In the hands of the drawer the right to sue was defeasible; when he sold the canvas it was defeated, and the Plaintiff took the bill subject to that contingency." That contingency is the equity which attached to the bill, and which bound him, having taken it after maturity. Mr. Justice *Compton* said: "Upon the concoction of this bill it was agreed that it was not to be paid if the canvas was sold. That agreement directly affects the bill, and was part of the consideration for it. The case, therefore, differs from that of a right of set-off against the indorser, which is merely a personal right not affecting the bill. In the present case the equity directly attaches to the bill. The Plaintiff, therefore, got a defeasible title only." In the case of *Cook* v. *Lister* (1), it is decided that the actual payment of an accommodation bill is an equity attaching to the bill itself, and therefore a good defence to an action against the acceptor. These authorities shew that the broad proposition for which *Ex parte Lambert* (2), was relied upon by the counsel for the official liquidator, namely, that the transferee of a bill after dishonour can under no circumstances have a better right against the acceptor than the drawer would have, cannot at this day be maintained, and, indeed, they most conclusively shew that that case is no longer law. The rule laid down in that case was so important that I sent for the Registrar's book for the purpose of ascertaining the facts of the case with accuracy. I have had the Registrar's book copied, and I find that instead of the bills being taken up by the Petitioner after they arrived at maturity, the facts were these: the bills had not arrived at maturity when they were taken up by the Petitioners, who petitioned Lord *Erskine* to be allowed to stand as creditors against the estate of the acceptor. The dates of the acceptances are given. The first of the two bills arrived at maturity on the 7th of April, and the second on the 12th of April, 1792. But they were taken up for the honour of the drawer, not therefore, observe, under protest, for they could not be protested before maturity; they were taken up for the honour of the drawers (or rather to prevent the bills being returned to *New York*) on the

(1) 13 C. B. (N.S.) 543. (2) 13 Ves. 179.

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27th of February, six weeks, therefore, before they arrived at maturity; and there is not a suggestion in the facts that they were taken up with notice, that they were, in point of fact, bills drawn upon the acceptor without effects, so that the two facts upon which the case is supposed to proceed entirely fail; first, that he took them after maturity is entirely wrong; secondly, that he took them with notice that they were accommodation bills is entirely wrong also. Upon these facts it appears, therefore, that the bills were taken up by the Petitioner nearly two months before they arrived at maturity, and without notice that they were accommodation bills, as between the drawers and acceptors. In every point of view, therefore, I am obliged to come to the conclusion that though *Ex parte Lambert* (1) may be considered as having been law in accordance with the current of authorities when Lord *Erskine* decided it, although it does not seem that even that proposition can be maintained when the facts are looked at, yet it is so wholly opposed to the more modern authorities that it is in fact completely overruled by them.

It is singular that, under these circumstances, none of the subsequent authorities have professed in terms to overrule *Ex parte Lambert*, but they have nevertheless effectually done so by a current of decisions in direct opposition to it, and it certainly is, I must say, very remarkable that this case, completely overruled by a current of authorities extending over more than half a century, continues to be cited in all the text-books—*Chitty*, *Bailey*, and even Mr. Justice *Byles*' book—as if it were still law, although the same books cite the authorities that have in principle completely overruled it. *Ex parte Lambert* is the case referred to for the proposition of law, which, I am bound to say, shews that it is the habit of even the best text writers to take these things for granted one after another.

It is therefore clear that in the present case Mr. *Swan* would have had the same right to recover the amount of these bills against the acceptors, as his transferors Messrs. *Drake, Kleinwort, & Co.* had, if he had simply taken the bills from them with or without indorsement, when he paid the money to them on the 12th of May, 1866. But it is contended, on the part of the official liqui-

(1) 13 Ves. 179.

dator, that Mr. *Swan* having taken up the bills *supra protest* for the honour of the drawer has effectually discharged the acceptors, except so far as the drawer could have recovered against them. It is a sound rule to construe all instruments and acts in accordance with the intention of the parties, if it be possible to do so. In the present case it is clear, beyond all possibility of doubt, that the intention of *Drake, Kleinwort, & Co.* in requiring Mr. *Swan* to take the bills in the form he did was simply to discharge their correspondents, the *St. Petersburg* bankers, who were the purchasers of them for value; and that there was no object or intention on their part to discharge the acceptors, *Overend, Gurney, & Co.*, and it is equally clear that Mr. *Swan's* intention was merely to protect his own interest, and that so far from desiring to discharge the liability of the acceptors, he took the bills in the entire faith that their liability was preserved. I need not again refer to the 19th paragraph of the admissions, which so explicitly states that he did it with regard to his own interest, and to protect his interest only. It is also clear beyond all doubt that the estate of *Overend, Gurney, & Co.* has no equity to be discharged from the liability to pay these bills by the transaction in question. *Overend, Gurney, & Co.* had accepted the bills under a mercantile arrangement with the drawers, which must be considered as a valuable consideration for the acceptance. They had a commission, they had a good customer, and the arrangement was one of mercantile value; and therefore, as regards all third parties, at all events, they must be regarded as bills given for valuable consideration; and the bills were in the hands of *bonâ fide* holders for value, and it is perfectly right, therefore, that they should be bound to pay the bills, whoever might be the holder of them for value.

Mr. *Roxburgh* said that this was a case in which one of two innocent parties must suffer, but that is, in my opinion, a wholly erroneous view of the case. *Overend, Gurney, & Co.* are not innocent parties in the sense in which that expression is used in this Court, but the acceptors of bills for consideration, and under circumstances which make it absolutely their duty to pay to the actual holders. It is admitted on both sides that the effect of taking up a dishonoured bill for the honour of any particular party to it, is to discharge all the subsequent parties, and in the

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present case the necessary consequence, therefore, of Mr. *Swan* having taken up these bills for the honour of the drawers, was to discharge the indorsees, who were, of course, subsequent to the drawer, and such effect was, as I have stated, in strict accordance with the intention of the parties when the bills were taken up; the intention of *Drake, Kleinwort, & Co.* being simply that the indorsees of the bills, the *St. Petersburg* bankers, should be discharged. What, then, is the situation of the holders as against the prior parties to the bill? *Mertens* v. *Winnington* (1) is very shortly reported to this effect. It was a case before Lord *Kenyon*:—"Assumpsit against the Defendant, as drawer of a bill of exchange. The bill in question was drawn by the Defendant on *Carrioni*, in *Italy*, in favour of *Webbould*. *Webbould* indorsed it to *Burton, Forbes, & Gregory*. They sent it to their correspondent in *Holland*, who sent it to *Italy*, where it was presented to *Carrioni* for payment, who refused it; upon which the Plaintiffs, who were merchants resident at *Venice*, paid the bill for the honour of *Burton, Forbes, & Gregory*, and now brought their action against the Defendant as drawer."—This, it will be observed, was not paid *supra protest* for the honour of any particular person, but paid generally.—"Lord *Kenyon* was of opinion, that where a bill is so taken up, that the party who does so is to be considered as an indorsee paying full value for the bill, and as such entitled to all the remedies to which an indorsee would be entitled—that is, to sue all the parties to the bill; and he therefore directed the jury to find a verdict for the Plaintiff." In *Chitty* on Bills (2) the rule, as I conceive, is laid down with perfect accuracy, until he comes to this unfortunate and mistaken case, *Ex parte Lambert* (3), when he says, "But a person taking up the bill for the honour of the drawer in particular, and not generally for the honour of the bill, has no right against the acceptor without effects," and then he quotes *Ex parte Lambert*. So that Mr. *Chitty*, like the rest, treats that case, overruled again and again, as if it were still law. In *Beawes*, which I see is frequently referred to by all text-writers, and treated as a book of eminent authority, the rule is thus laid down (4): "He that pays a bill *supra protest* immediately succeeds the possessor

(1) 1 Esp. 113.
(2) Page 509.
(3) 13 Ves. 179.
(4) Page 570, s. 54.

in the right and title thereof, though there be no formal transfer made, nor *cessio actionis* on the holder to the payer, yet to prevent all disputes it may be more advisable, especially in some cases, to have this cession made in form, and to this the possessor is obliged whenever it is demanded of him." Then in sect. 57 he says: "He that discharges a bill protested for non-payment"—which is the case here—"in honour of the drawer, hath no remedy against the indorsers,"—that is the very object of this particular form, to discharge the indorsement of the *St. Petersburg* bankers,—"though he that honours a bill protested for non-payment for an indorser hath his remedy over, not only against the said indorser, but against all that were before him, including the drawer, though he hath no action, law, or right, against the indorsers that follow him for whose account the payer was willing to discharge the bill as has been mentioned about accepting bills." Therefore *Beawes* puts it thus: he takes it up for an indorser, he succeeds to the title of that indorser, and he has the same right against him that the holder had. The same doctrine is laid down in *Pothier* (1). I have a translation of the section here, and have verified it, and I believe it to be perfectly accurate; it is this: "Although in the case of other debts, a stranger who has no interest in paying them is not by paying them subrogated into the rights of the creditor, unless he has for that subrogation the consent of the creditor or of the debtor, nevertheless in the case of bills of exchange a stranger who pays it *supra protest* is rightfully subrogated to all the rights of the holder of this bill,"—observe the word holder, "*propriétaire*" is the expression in French,—"although there be no transfer of it, and though the receipt which had been given him made no mention of any subrogation having been accorded to him, or say nothing about his having demanded it; this is so laid down," and then various authorities are cited for it. If the liability of the acceptor is preserved when the bill is taken up for the honour of an indorser, why should it be lost if it is taken up for the honour of the drawer, and for full value, in the belief that the bill was accepted for value? There is no principle in the rule which is contended for to the contrary. I think the true principle applicable to the case is that which is contended for by Mr. *Watkin*

(1) Section 171, p. 336.

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Williams, that Mr. *Swan's* position is that of an indorsee for value after maturity, subject only to this, that his becoming so *supra protest* for the honour of the drawer discharges all the subsequent parties, and obliges him to look to the acceptor only, as if there had been no indorsees of the bill. The argument to the contrary on the part of the official liquidator was in truth mainly, if not wholly, based upon the decision of *Ex parte Lambert* (1), which I have shewn to be no longer law. Justice certainly requires the estate of *Overend, Gurney, & Co.* to pay these bills, and I am happy to find, upon a careful consideration, that there is no rule of law which obliges me to come to a conclusion which would be totally opposed to justice, that by the transactions between *Drake, Kleinwort, & Co.* and Mr. *Swan*, on the 12th of May, 1866, that estate had been discharged from the liability to pay these bills. If I were to come to that conclusion, I should be in effect deciding that Mr. *Swan* had done precisely the same on the 12th of May as if he had gone to the official liquidator and given him a cheque upon his bankers for £26,545. That amount they were liable to pay while the bills remained in the hands of *Drake, Kleinwort, & Co.*, and it would be a most absurd conclusion, in my opinion, if that liability to pay were discharged immediately Mr. *Swan* paid his £26,545, and took from *Drake, Kleinwort, & Co.* all the rights of these bills; the object of the transaction being to put him in all respects in their situation as against the acceptors. His object was to make this calculation: Is it to my advantage to pay down £26,545, taking my chance of being reimbursed out of the estate of *Overend, Gurney, & Co.*? Probably he made his calculations that *Overend, Gurney, & Co.* would take some time to wind up, but with such a body of shareholders they must ultimately pay in full. The extent of his risk, therefore, was being kept out of his money for a year or two. On the other hand, if he allowed these bills to go back to *St. Petersburg*, the goods, which are stated to be of very large value, would have been stopped at *St. Petersburg*, and supplies to the manufacturers would have been withheld; therefore upon this calculation, not intending to benefit the drawer or the acceptor, he only had regard to his own interest and his own protection. He adopted a most

(1) 13 Ves. 179.

reasonable course, and I should deeply regret if I had not the power of protecting him in it. In taking up these bills he simply placed himself in the position of the holders of the bills. I must therefore decide that these bills, in the hands of Mr. *Swan*, do constitute a debt against the estate of *Overend, Gurney, & Co.*, and he must be admitted to prove for them accordingly.

I desire to be understood as resting my decision on two distinct points. First, that an indorsee or transferee for value of a bill of exchange after dishonour, has a right to recover against the acceptor, whether the bill was given for value or not, unless there be an equity attached to the bill itself amounting to a discharge of it. I have already stated that the right of set-off is not an equity which attaches to the bill itself. The only right of the acceptor against the drawer here was a right of set-off, or a right to take the accounts between them. That, as I have shewn by the authorities, is not an equity which attaches to the bill. Secondly, that the person who takes up a bill *supra protest* for the honour of a particular party to the bill, succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honour he takes it up, and that he cannot himself indorse it over. Mr. *Mathew* cited the authority of a French writer upon that subject. The rule there laid down was acceded to by Mr. *Watkin Williams* in his reply, and I find it adopted in many cases, that a person who does take up a bill for the honour of a particular person, *supra protest*, cannot himself indorse it over. The result therefore is, that the debt must stand against the estate.

Solicitors for Mr. *Swan*: Messrs. *Cotterill & Sons.*

Solicitors for the Official Liquidator: Messrs. *Maynard, Son, & Co.*

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1868

June 1.

In re EAST OF ENGLAND BANKING COMPANY.

Winding-up—Interest on Debts—Stoppage of a Bank—Demand for Payment—Companies Act, 1862—*26th Rule of Order of November*, 1862.

4 Ch 644

Upon the winding up of a banking company all the debts were paid in full. The creditors on deposit accounts claimed interest at the rate of 4½ per cent., in pursuance of a resolution passed by the directors shortly before the stoppage of the bank, but not communicated to the depositors, increasing the rate of interest to that amount, and in pursuance of an intimation by the liquidators that the increased rate would be allowed:—

Held, that the resolution of the directors not having been communicated to the depositors, and the liquidators not having power to make the bank liable for any fixed amount of interest, the previous rate of interest, £4 per cent. only, would be allowed.

Interest was also claimed upon bank notes and drafts current at the time the bank stopped payment:—

Held, that closing the doors of the bank dispensed with the necessity of a formal demand for payment, and that interest was therefore payable:

Held, also, that the creditors were entitled to interest under the 26th rule of the Order of November, 1862, the Court being of opinion that the rule was still binding upon the Judges, and must be acted upon until abrogated.

Interest was allowed at £4 per cent.

Observations on *Hatfield Cask Company* (1), and *In re Herefordshire Banking Company* (2).

varied on appeal 4 Ch 14

THIS was an adjourned summons from Chambers to determine the rate of interest to be allowed to the creditors of the *East of England Banking Company*.

The company suspended payment on the 19th of July, 1864. On the 18th of August following a resolution was passed at a general meeting of the shareholders that the company should be wound up voluntarily under the *Companies Act*, 1862, and liquidators were then appointed. On the 3rd of November, 1864, the voluntary winding-up was ordered to be continued under the supervision of the Court. All the debts of the company had been paid in full, and the liquidators were now desirous of paying such interest upon the debts as should be payable, and of finally winding up the affairs of the company.

3 De G J & S. 603.

(1) 2 N. R. 502; 9 Jur. (N. S.) 997; 11 W. R. 971.

(2) Law Rep. 4 Eq. 250.

The amount due on current or drawing accounts was £231,755, carrying an agreed rate of 1½ per cent. The amount of deposit accounts was £272,999, a portion of which carried certain agreed rates of interest, while the remainder, amounting to £181,182, carried an interest fluctuating with the bank rate, and on the 19th of July, 1864, the rate allowed on this sum was £4 per cent. A large proportion of the last mentioned claims, and of those on notes and drafts, had been purchased from the depositors by the *Provincial Banking Corporation*, who had bought the goodwill of the business.

The creditors for notes and drafts, amounting to upwards of £25,000, would not, in the ordinary course of business, have been entitled to any interest.

Upon the summons taken out for determining the rate of interest payable to the creditors the Chief Clerk came to the following opinion:—That as to the first class of creditors, namely, those on current or drawing accounts, 1½ per cent. should be allowed. As to the second class, creditors on deposit accounts, interest should be allowed at the agreed rates, and where there were no agreed rates, then at £4 per cent. And as to the third class of creditors, holding notes or drafts current at the time of the stoppage of the bank, that as in these cases no demand had been made for payment no interest should be allowed.

To the interest allowed in accordance with agreed rates no objection was raised.

With respect to the deposit accounts over £500, as to which there was no agreed rate, interest at £4 10*s.* per cent. was claimed upon the following grounds:—First, that a resolution was passed by the board of directors of the bank on the 6th of July, 1864, in the following terms: "In consequence of the general advance in the rate of interest allowed on deposit by other banks in the district, it is resolved that the present rate to be allowed by this bank on deposits remaining three months be 4½ per cent. on sums amounting to £500 and upwards, and 4 per cent. on sums below £500;" and, secondly, that it had been stated by the liquidators of the *East of England Bank* that interest would be allowed on the basis of the above resolution, in a correspondence with the *Provincial Banking Corporation*, on the faith of which it was alleged

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they had dealt with the creditors. The same correspondence contained a statement by the liquidators that interest at £4 per cent. would be paid on the notes and drafts.

Affidavits were filed to prove that the resolution of the directors with regard to raising the rate of interest had been communicated to the managers of the different branches of the *East of England Bank*, but there was no evidence to shew that the resolution had been made public in such a manner as to give notice of its effect to the customers of the bank, though the usual course had been to post up notices of alterations in the rate of interest.

Upon the third class of debts—that is to say, promissory notes and drafts—interest was claimed under the 26th rule of the General Order of Nov. 1862, made in pursuance of the *Companies Act*, 1862, and on the ground that the stoppage of the bank rendered a demand unnecessary. The liquidators' admission was also relied on.

Mr. *Wickens*, and Mr. *Cozens-Hardy*, for the official liquidators:—

We admit that there was a resolution passed to the alleged effect, but it is not shewn that this resolution was made known to the depositors, so that they could not have placed their money in the bank, or continued it there, upon the faith of such resolution. There is no evidence of any notice being given of an increase in the rate of interest, and in the absence of an agreed rate the creditors can consequently claim no more than the current rate of interest known to them at the time they placed their money on deposit.

As to the class of creditors who held promissory notes and drafts—they make their claim to interest either by virtue of the 26th rule, framed in pursuance of the power given to the Lord Chancellor under the *Companies Act*, 1862, or under their legal right, after presentation of the notes or a demand made for payment. With regard to the 26th rule, it was intimated by Lord *Westbury*, in the case of the *Hatfield Cask Company* (1), that the Judges had no power under the Act to make the rule, and the Master of the

(1) 2 N. R. 502; 9 Jur. (N.S.) 997; 11 W. R. 971.

Rolls also took that view of the Order in *In re Herefordshire Banking Company* (1). That case was precisely similar to the present, and His Lordship felt himself bound by Lord *Westbury's* decision, and refused to allow interest.

Then as to the legal right to interest, there is no evidence of presentation of the notes after they became due, and no demand for payment.

In *Beeching* v. *Gower* (2) it was held that there must be an actual presentation of a note for payment; and in *Sands* v. *Clarke* (3) it was considered requisite that the bill should have been presented at the place where it was made payable, notwithstanding that the Defendant was absent from home and could not be found at that place. The company is not bound by any erroneous admission of points of law made by the liquidators.

Mr. *Glasse*, Q.C., and Mr. *Higgins*, for the *Provincial Banking Corporation*:—

The question whether creditors taking the current rate of interest without any specified agreement as to the amount, are entitled to £4 10*s.* per cent. in cases where their deposits amounted to £500 and upwards, is concluded by the resolution of the directors, which is not disputed. The resolution was made known to the managers of the branch banks, and might have been known to all the customers of the bank if they had made inquiries. There is evidence to shew that it was customary to post up at the different branches of the bank any variation in the rate of interest, and it was the duty of the managers to carry this rule into execution. If it was not done, the creditors ought not to suffer by the neglect in duty of the officers of the bank. But, whether or not notice was given, the company are bound by the resolution to allow interest at 4½ per cent. on sums above £500, which was the current rate at the time of the stoppage of the bank. The company are also bound by the communication made by the liquidators, who acted on their behalf, as it was upon the faith of their communication that the present holders of those securities obtained assignments of them from the creditors.

(1) Law Rep. 4 Eq. 250. (2) Holt, N. P. C. (C.P.) 313.
(3) 8 C. B. 751.

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The more important question is as to the bank notes and drafts forming the third class of debts. On these we are entitled either to £4 per cent. under the 26th rule made under the Act of 1862, or to £5 per cent. under the general law. The case of the *Hatfield Cask Company* (1) is reported shortly in three publications, but in none of them is there any distinct opinion given by Lord *Westbury* that the 26th rule was not still binding. It was not necessary for His Lordship to decide the case before him with reference to that rule, since the company was being wound up under the Act of 1856, and not the Act of 1862. The case before the Master of the Rolls, *In re Herefordshire Banking Company* (2), must be admitted to be similar to this; but it is evident that Lord *Romilly* over-stated the case before Lord *Westbury*, when he treated His Lordship's judgment as a positive decision that the Court had no power to make such a rule as the 26th. The Act of 1856 did not allow contingent claims to be proved, but the 158th section of the Act of 1862 was introduced for the purpose of enabling all claims to be proved, as in the Court of Bankruptcy. The Act of 1856 only applied to a dissolution of partnership, whereas the Act of 1862 enabled all creditors to come in, and prevented them, by the 87th section, from going to law upon actions to recover their debts, and the 26th rule gave them the interest which they would have been entitled to at law. This question was discussed in *Williams* v. *Harding* (3). Under any circumstances the 26th rule should have been abrogated if it was *ultrà vires*, and so long as it stands unrepealed every Court is bound by it, notwithstanding any *dicta* by one or more Judges.

But we rest our claim on stronger grounds than the effect of the 26th rule. When a promissory note is dishonoured, interest runs upon it at the rate of £5 per cent. from the demand for payment: *Byles* on Bills (4). Therefore all we have to do is to prove that a demand was made in respect of these securities. In this case the bank stopped payment and the doors were closed, which, according to Mr. Justice *Byles*, was a refusal to pay, dispensing with a formal demand: *Byles* on Bills (5).

(1) 2 N. R. 502; 9 Jur. (N.S.) 997; 11 W. R. 971.
(2) Law Rep. 4 Eq. 250.
(3) Law Rep. 1 H. L. 9.
(4) Page 296.
(5) Pages 196, 197.

Then, again, we have shewn a demand in writing made in the correspondence between the *Provincial Bank* and the liquidators, and the answer of the liquidators in October is a submission to pay interest. This correspondence passed before the *Provincial Bank* had become purchasers of these notes, and it was upon the faith of this express statement that interest would be payable, that the *Provincial Bank* took assignments from the creditors.

Hyde v. *Price* (1) is an authority to shew that proceedings under the Act 3 & 4 Will. 4, c. 42, though made with reference to Courts of Law, will be adopted by this Court; and in *In re State Fire Insurance Company* (2), it was held, upon the winding-up of a joint stock company, that interest would be allowed upon all claims in respect of which interest would have been recoverable at law as damages. And in the *Hull and Selby Railway Company* v. *North Eastern Railway Company* (3), the Court ordered payment of interest upon rent which had been paid into Court, on the ground that the Defendants had obstructed the recovery of interest at law.

In *In re Trent and Humber Company* (4), lately decided by Vice-Chancellor *Giffard*, it was held that there was at any rate a claim for damages, if not for interest.

Upon these authorities we are either entitled to 5 per cent. under the general rule of law, or to 4 per cent. under the 26th rule.

SIR R. MALINS, V.C.:—

The only question remaining now, as between the creditors and the company, is what amount of interest is to be paid in respect of the debts. There were three classes of creditors when this matter was before the Chief Clerk. No exception is taken to his conclusion on the first class.

With regard to one of the other classes the Chief Clerk says where the rates fluctuated he allowed 4 per cent., being not only the usual rate allowed by the Court but also the actual rate at the time of the stoppage. The claimants in the present case—the bank to which the business of this wound-up bank was sold by a

(1) 8 Sim. 578.
(2) 2 H. & M. 722.
(3) 5 D. M. & G. 872.
(4) Law Rep. 6 Eq. 396.

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contract entered into shortly before the stoppage and carried into effect under the direction of the Court—claim 4½ per cent., and they rest their claim on a resolution passed by the bank on the 6th of July, that is, thirteen days before it stopped payment, that they would henceforth allow 4½ per cent. upon deposits. In order to make out that the present claimants are entitled to 4½ per cent. they say that the resolution must have been communicated to all the depositors, that they are the transferees of the deposit notes, that the persons from whom they derived those notes must have had notice, and that they are entitled to the benefit of that notice, and must have interest at 4½ per cent. and not 4 per cent. They rest their case on that resolution, and if they fail upon that, they rest their claim, secondly, on a letter written by the bank to the official liquidator, requiring to be informed what rate of interest the various debts bore, which was answered by a letter from the official liquidator, stating that this particular class of debts bore interest at 4½ per cent. Now, with regard to the first ground on which the claim is rested, namely, the resolution, although I think it is not improbable that the effect of that resolution was known to some of the depositors, the evidence wholly fails to prove that it was actually communicated. There were many branches of this bank, and this would be a resolution made known to the managers of the various branches: it would be their authority as to the extent of interest that they would allow; but there is a total absence of evidence, in my opinion, to shew that any of the persons represented by Mr. *Glasse* either made deposits, or allowed deposits already made to remain, upon the faith of that resolution. That ground, therefore, in my opinion breaks down.

With regard to the second ground on which the claim of 4½ per cent. is raised, I accede to the argument that the official liquidator had no authority to make a contract binding upon the company, which was not already binding upon it, and that he had no more authority by that letter to make the company liable to 4½ per cent. interest, if they were not so liable before, than he would have had to make them liable to 14 per cent. interest if that had been the sum named in the letter. On both those grounds, therefore, I think the claim for an additional half per cent. interest on the second class of debts fails, and I come to that conclusion with less reluctance

because I think that in the unfortunate position of the shareholders in this company, who have now, by means of most distressing calls made upon them, paid 20*s.* in the pound, the justice of the case will be met, and the claimants may be well satisfied if the shareholders pay, and the claimants receive, 20*s.* in the pound upon the whole of the debts, with 4 per cent. interest from the day of the stoppage. That is a claim, however, of far less importance in principle than the next question which concerns the third class of creditors—those who are creditors in respect of notes and drafts current at the time of the stoppage. The Chief Clerk says, as in these cases no demand had been made for payment no interest is to be allowed. Now, this raises a very general and a very important question. The law is perfectly well known and distinct, that with regard to all negotiable instruments, by the law merchant, every bill of exchange and promissory note carries interest from the date of its maturity. Where a note on demand, having no period of payment, is intended to bear interest, the usual course is to say "I promise to pay on demand so much money with interest at a certain rate," otherwise it will carry no interest until the demand is made. But where a note is payable on demand which on the face of it does not carry interest, it is perfectly well known that it carries interest only from the time when the demand is made. The notes in respect of which interest is here claimed were common bank notes, I presume in the usual form. The banker promises to "pay bearer on demand." In the present case payment of interest is resisted on behalf of the official liquidators on two grounds. First: that no demand has ever been made. It is perfectly true that in consequence of its being notorious that this bank closed its doors against all its creditors on the 19th of July, 1864, no formal demand was ever made for payment; but where a promissory note is made payable on demand, and the maker of the note publicly announces to all the world that he has stopped payment, if the law of *England* obliges a creditor under those circumstances, in order to have a right of suit in respect of interest, to go and do that which he knows to be a perfectly vain act, that is, knock at the door and ask some one to open it that he may make a demand, when he knows that upon knocking at the door it will not be opened, I cannot say that the law of *England* would

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be in a very rational position. But I do not believe it to be in such a state. I believe the law is correctly stated by Mr. Justice *Byles* in the following passage (1):—"It was decided in the same case in error in Exchequer Chamber, *Bowes* v. *Howe* (2), that an allegation in the declaration that the makers became insolvent, and ceased, and wholly declined and refused any of their notes, is insufficient, not being equivalent to an allegation of presentment." Then Mr. Justice *Byles* makes this statement, to which I accede upon principle, and, I believe, upon authority:—"But it is conceived, notwithstanding the observations of the Court in the last case, that it cannot be necessary for the holders of notes of a bank which has notoriously stopped payment, and is shut up, to go through the empty form of carrying their notes up to the bank doors and then carrying them home again." Then he adds this note: "Since the above observations were written I observe the point has been so ruled at *Nisi Prius*," and he refers to the cases of *Henderson* v. *Appleton* (3) and *Rogers* v. *Langford* (4).

Now it is perfectly beyond doubt I believe, that if, instead of this being a winding-up under the Act of 1862, it had been a bankruptcy of the company, all debts would carry interest from the date of the bankruptcy. That is, if there was money to pay them, the first thing being to pay the principal; when the principal is paid, then, before the bankrupt can take any of the assets applicable to creditors, he must pay interest upon all debts. These promissory notes therefore, with or without demand, if the case had been in bankruptcy, would have carried interest. The process of winding up here has lasted nearly four years, and if this technical objection is allowed, that the holders of the notes did not go through the idle ceremony of knocking at the door, which they knew would not be opened, to make a demand, which they knew they could not make—if no interest under these circumstances is given we have then this absurdity, that the same class of creditors who, under bankruptcy, would have been entitled to interest, and who, if they had gone through this unmeaning ceremony, would also have been entitled to interest, have now lost four years' interest upon their debts. It might have been ten years if it had been a very

(1) Page 196.
(2) 5 Taunt. 30.
(3) Chitty, 9th Ed. p. 356.
(4) 1 C. & M. 637.

troublesome winding-up, and I cannot but regard that as a very irrational state of things. I come, then, to the conclusion I have mentioned upon the first ground, not only upon the case to which I have referred, but upon the general rule of the Court, as in the *Hull and Selby Railway Case* (1), that where a person under an obligation to make payment is himself the impediment to a preliminary act being done by those who have claims upon him, they must be in the same situation as if the act had actually been done. Here, the bank made it impossible for the holders of these notes to make a demand, and I must treat them as being in the same situation as if the demand had been made; and upon those general principles I conceive interest is payable upon these notes.

But there is another ground on which interest is payable, unless the rule which I am now about to advert to is no longer a rule of the Court. The Legislature having, by the 170th section of the Act of 1862, given the Lord Chancellor, with the assistance of the other Judges, authority to make Orders for the winding-up of companies, in the Order signed by the Lord Chancellor, the Master of the Rolls, and three Vice-Chancellors, is found this rule, No. 26:—"Interest on such debts and claims as shall be allowed"—here the debt is unquestionably allowed—"shall be computed, as to such of them as carry interest, after the rate of interest they respectively carry. Any creditor whose debt or claim so allowed does not carry interest, shall be entitled to interest after the rate of 4 per cent. per annum, from the date of the order to wind up the company, out of any assets which may remain after satisfying the cost of the winding-up, the debts and claims established, and the interest of such debts and claims as by law carry interest." That is a rule of the Court absolutely binding upon me unless it has been abrogated or in some way completely repealed. Now, is that a rule or is it not a rule of the Court at the present time? If it is a rule of the Court, it is my duty to follow it; if it is not a rule of the Court, then so far as the claim to interest is rested upon this rule, of course it fails.

Upon the question whether this is or is not a rule of the Court the matter stands thus:—In the case of the *Hatfield Cask Company* (2), the question was discussed by Lord *Westbury*, who was

(1) 5 D. M. & G. 872. (2) 2 N. R. 502; 9 Jur. (N.S.) 997; 11 W. R. 971.

3 De G. J. & S. 603.

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the Lord Chancellor who signed the Order—though it did not strictly come before him, because it was not in the slightest degree necessary for him to pronounce any opinion upon the question, inasmuch as the case before him was a winding-up under the Act of 1856. There are three reports of Lord *Westbury's* judgment, which have been referred to to-day. They are somewhat different in words, but they all, in substance, amount to the same thing. It was a perfectly extra-judicial opinion, not a decision called for by the facts of the case. Lord *Westbury* says that he is afraid, or that he apprehends, or that he thinks, there may be some doubt whether the 26th rule is not *ultrà vires,* beyond the power conferred on the Court by the *Companies Act,* 1862. Now I confess that it does appear to me that if Lord *Westbury* was decidedly of opinion that this 26th rule went beyond the powers of the Court, it was incumbent upon him as the head of the Court forthwith to take steps that the rule should no longer appear as a rule of the Court calculated to influence the conduct of other parties; that he ought at once to have taken steps to consult the other Judges to see whether they concurred with him, and if they did, to have the rule repealed; he could not do it alone, he must have had the concurrence of the other Judges. That, however, was not done, nor does it appear that there was any other instance in which the attention of Lord *Westbury* was ever called to the effect of that rule. This, therefore, was a mere *obiter dictum,* which I cannot help thinking the reporters would have done well—at all events would not have done ill—to have omitted, because it was not an expression of opinion, but only an apprehension. But there was a subsequent case, which I agree with Mr. *Wickens* in thinking is a case on all-fours with the present—the same case, in fact, changed only as to the name of the bank (the *Herefordshire Banking Company* (1))—which came before the Master of the Rolls, another of the learned Judges who signed the Order of November, 1862; and it is very remarkable that the two first persons who signed the Order are the two Judges who proclaimed their opinion, or their apprehension at all events,—an opinion on the part of the Master of the Rolls, an apprehension on the part of Lord *Westbury,*—that they had gone beyond their powers. This decision of

(1) Law Rep. 4 Eq. 250.

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the Master of the Rolls was in the month of July last, and is reported (1). It appears that the Master of the Rolls treats the observation of Lord *Westbury* as a decision, for he says:—"I entertain no doubt about this case."—The reason why, I understand, he entertained no doubt was because Lord *Westbury* entertained no doubt about it.—"It is impossible to get over the judgment of Lord *Westbury*, which is very strongly and well put." Now, I am sure I do not know whether Lord *Romilly* did or did not revise these sheets,*—I presume he did—but I cannot conceive how it was that his Lordship could treat that as a judgment of Lord *Westbury* which was no judgment, and how he could regard that as strongly and well put which was very feebly put, not as a decided opinion, but as a mere fear. One of the best reports of Lord *Westbury's* observation says:—"I fear the Court went beyond its powers." I conceive, therefore, that Lord *Romilly* proceeded upon an entirely erroneous view of the expression of opinion of Lord *Westbury*, which was not a judgment, and which, instead of being put strongly, was very faintly put. Lord *Romilly* says:—"Although I was a party to that Order of November, 1862, I cannot say that the Lord Chancellor's remark, that it was *ultrà vires*, is unfounded, and consequently I must follow his decision respecting it implicitly."

Every judgment of the Master of the Rolls is entitled to the highest consideration, and although I am about to give an opinion diametrically opposed to it, I would rather refrain from giving an opinion upon the subject of the Order, because the matter has got into such a state that I think it absolutely necessary it should go before the Court of Appeal; and I think it is the duty of this Court—and if no one else undertakes it, I will—to call the attention of the Lord Chancellor to the anomalous position of things, in which an Order is allowed to stand as an Order binding on the Judges of the Court, and binding on the suitors of the Court, which has had cold water thrown upon it in this way—first, by a faint expression of opinion by Lord *Westbury;* and secondly, by a positive decision of the Master of the Rolls.

(1) Law Rep. 4 Eq. 250.

* This report was revised by the Master of the Rolls. All the Equity decisions in the *Law Reports* are revised by the Judges.—[EQ. ED.]

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I think everybody will agree that nothing can be more inconvenient than to have doubt cast upon a positive Order of the Court, signed by the Judges, and which is to all intents and purposes an Order binding upon every Judge of this Court. Now, my opinion is opposed—I do not hesitate to say so—to the opinion of Lord *Westbury* and the opinion of the Master of the Rolls; because in the case of traders,—and every shareholder, however unfortunate his position may be, by taking shares in a trading company, a bank, or otherwise, becomes a trader,—reason and justice require that those who trust them shall be paid the full amount of their debts, and interest for the period during which payment is delayed. As a bankrupt is not permitted to receive any part of his assets until he has paid 20*s.* in the pound with interest, so in my opinion the shareholders in a joint stock company cannot consider themselves free of demand, until the debts, with interest, have all been paid.

Upon principle, therefore, I am in favour of the payment of interest, and upon the 26th rule I am bound to say that interest is payable. If there is any doubt about that, I now give the liquidators power—and I am most desirous that they should exercise it—to go before the Court of Appeal at the expense of the estate for a formal decision, and if this rule is as wrong as I think it right, it must be repealed. While it remains a rule, signed by the Lord Chancellor and the other Judges, I shall treat it as a rule binding upon me. I follow it because it is a rule, and because it accords with my own judgment as to what is just between the parties. The order will be as to the deposits without special agreement—for interest at £4 per cent. only from the date of stoppage; and as to the notes and drafts—for interest at £4 per cent. from the date of stoppage. Costs out of the estate.

Solicitors for the Official Liquidators: Messrs. *Sharpe, Parkers, & Pritchard.*

Solicitors for the *Provincial Banking Corporation:* Messrs. *Lewis, Munns, Nunn, & Longden.*

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May 26, 27; *June* 2; *July* 15.

Information — Crown Accountant — Jurisdiction of the Court — Clerk of the Patents — Clerk to the Commissioners of Patents — Discounts on Stamps — Statute 3 & 4 *Will.* 4, *c.* 84 — "*Expenses incident to the performance*" *of the Duties of the Office — Fees and Emoluments — Cost of purchasing and engrossing Parchments for Patents.*

By the 3 & 4 Will. 4, c. 84, it was enacted that from and after the 20th of August, 1833, there should be paid to the Clerk of the Patents the yearly salary of £400; and that the said salary should be taken in full satisfaction for the duties of the office, and of all expenses incident to the performance thereof; also that it should be lawful for the Clerk of the Patents to receive all the fees and emoluments which had been accustomed to be paid, and which of right ought to be paid to the said officer in respect of the said office, and that such fees and emoluments should be accounted for once in every three months, and should be paid by the said officer into the Exchequer.

The Defendant was, in 1833, appointed Clerk of the Patents under the above Act, and in 1852 was continued in his office as Clerk of the Commissioners of Patents:—

Held, that the position and liability of the Defendant, under the above statute, were those of a paid agent for the purpose of receiving and paying over money; and that, in the absence of any enactment expressly excluding the jurisdiction, the Crown was entitled in this Court to file an information against the Defendant for an account of the public moneys received by him.

It having been the practice in the Inland Revenue Department for the purchasers of stamps to be allowed a reduction on payment in cash, the Clerk of the Patents had been accustomed to purchase stamps in the Revenue Office for the accommodation of the patentees, he paying the reduced amount for the stamps, and afterwards receiving the amount in full from the patentees:—

Held, that he was liable to account for any profit that might have been made on the purchase of stamps purchased with public moneys, but not for any profit made on the purchase of stamps purchased with his own money.

Previously to August, 1833, a customary fee of £6 8*s.* 4*d.* was paid by every patentee upon the issue to him of a patent for an invention, and on payment of such fee he received the patent engrossed on parchment, without being charged with any specific sum for the cost of the parchment or of engrossing and preparing the patent:—

Held, that the Clerk of the Patents, in accounting for the fees received by him from patentees, was not entitled, after the passing of the Act, to make any deduction in respect of the cost of the parchment, or of the preparation and engrossment of the patent, from the fee paid to him by the patentee.

THIS was an information by the Attorney-General, on behalf of the Crown, against *Leonard Edmunds*, who on the 29th of August,

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1833, was appointed Clerk of the Patents, and in 1852 was appointed Clerk to the Commissioners of Patents, and who continued in such office until his resignation in July, 1864, praying for an account of all fees and moneys received by the Defendant, or by any person on his behalf, since the date of his appointment to the above offices respectively, and of the application by the Defendant of all such fees and moneys. The information also prayed for a declaration that, in taking such accounts, the Defendant ought to account for all profits made by the purchase and re-sale of stamps; and that he was not entitled to make any deduction whatever for or in respect of the parchment used in the preparation or engrossment of any document issued by him as Clerk of the Patents, or any other deduction whatsoever in respect of the preparation and engrossment of any such document.

By the 3 & 4 Will. 4, c. 84 (28th of August, 1833) intituled "An Act to provide for the performance of the Duties of certain Offices connected with the Court of Chancery which have been abolished," after reciting an Act of the 2 & 3 Will. 4, c. 111, for abolishing certain sinecure offices connected with the Court of Chancery, whereby it was enacted that the offices therein specified, including that of the Clerk of the Patents, should cease and determine from the 20th of August, 1833; and reciting that it was necessary that competent persons should be appointed for the discharge of the duties of the said offices when vacant; and that it was desirable that the persons to be appointed to discharge the duties of such offices should be paid by fixed salaries for such their trouble; it is enacted (sect. 4) that from and after the 20th of August, 1833, there shall be paid to the Clerk of the Patents the yearly salary of £400.

Sect. 6 enacts as follows: "That the said several salaries" (including that of the Clerk of the Patents) "shall be taken in full satisfaction for the duties of the said offices respectively, and of all expenses incident to the performance thereof."

Sect. 7 enacts that it shall be lawful for the Clerk of the Patents (amongst other officers named) "to have, receive, and take all and every the fees and emoluments which have been accustomed to be paid, and which of right ought to be paid to the said several officers respectively, or to any deputy or clerk of

such several officers, in respect of the said several offices, as the same would have been payable if this Act and the said recited Act had not been passed; and that such fees and emoluments shall be accounted for once in every three months, commencing in the first instance from the date of such appointments respectively, and shall be paid by the said officers respectively into the receipt of His Majesty's Exchequer, and be carried to and made part of the Consolidated Fund of the United Kingdom of *Great Britain* and *Ireland;* and the account of the party so paying such fees shall be verified by his oath, which oath any one of the Masters in Ordinary of the High Court of Chancery is hereby required and authorized to administer."

In the year 1852 the *Patent Law Amendment Act* was passed; and in the same year the salary of the Defendant, who had been, as stated, appointed Clerk to the Commissioners of Patents, was fixed by the Commissioners at £600 a-year.

The information contained several charges against the Defendant, which, in the result, it becomes unnecessary to state; the only two points of importance decided on this hearing being the discounts on stamps question, and that of the 12*s.* 10*d.* fee for parchments.

As to the former, the information stated that in 1834 the Defendant commenced a practice of purchasing from the Stamp Office, at wholesale or reduced prices, stamps, which were afterwards used in the office for patents and other documents, and paid for by the patentees in full; that these stamps were purchased out of moneys which had been already received for fees; and that the Defendant ought to account for the profit so made.

As to the latter, it stated that the Defendant, from the date of his appointment until the end of the year 1844, discharged (as it was his duty to do) as part of the expenses incident to the performance of the duties of his office the cost of the parchments upon which the patents were engrossed, and of engrossing the same; but that he now claimed to be entitled to deduct from the fees received by him the sum of 12*s.* 10*d.* for every skin of parchment.

The Defendant answered these two charges in the following way:

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He said that when he was appointed, he found that the duties of the office were discharged by a deputy, who, after Defendant's appointment, continued to discharge the duties. The deputy received the fees, and paid them into a separate account kept by the Defendant at *Coutts'* bank, called the Patent Office Account. There was no direction in the Act as to how the oath required by the statute was to be received, and no provision for delivery or audit of the accounts of the Clerk of the Patents. Defendant said that though he had repeatedly tried, he had never been able to obtain an audit, and had never been permitted to deliver his accounts. Upon his appointment he found that his predecessors had been in the practice of getting stamps for the patentees, taking the discount.

As to the second question, he said that when he was first appointed, he paid the costs of the parchments and engrossing out of his own pocket; but he did not formally deduct the 12*s.* 10*d.* till 1845, when the cost had become so great that it was more by £30 than the whole salary of £400 a year.

He admitted that in 1853, when, owing to the passing of the *Patent Law Amendment Act*, the number of stamps required in the office was very great, it became requisite that there should be a sum of £350 in the hands of the clerk to pay for the stamps; and in order to provide for this money, as also the amount of the small current disbursements in the office, he (the Defendant), on the 23rd of August, drew a cheque for £500 on the Patent Office Account, £350 for stamps and £150 for disbursements. He said, however, that this was only a temporary loan, which was afterwards replaced.

He also, in answer to the whole information, submitted that this Court had no jurisdiction; and that the only Court of competent jurisdiction was the Court of Exchequer.

Appended to the answer were schedules, in which the Defendant purported to account in full for all the fees received by him on all the accounts referred to in the information.

The amount involved in the discounts on stamps question was about £5131, that on the 12*s.* 10*d.* fee about £3033.

It appeared from the evidence that the customary fee payable to the Consolidated Fund for a patent for an invention, in and prior to 1833, was £6 8*s.* 4*d.*

The *Attorney-General* (Sir *J. B. Karslake*), Sir *Roundell Palmer*, Q.C., and Mr. *Wickens*, for the information:—

All that the Crown asserts is, that the Defendant is a debtor, and all that the information asks is, that an account may be taken, and that the direction may be prefaced with declarations as to the allowances on stamps, and as to the deduction of 12*s.* 10*d.* for parchments.

The Defendant makes no statement at all as to when he first purchased the stamps which he kept in stock at the office, nor whence he procured the money. But he admits that on one occasion, at all events, a cheque was drawn on the Patent Office Account for £500, part of which, £350, was to be used for stamps. He says, indeed, that that money was only used temporarily, and was very shortly afterwards replaced. But there is no evidence of that sum having been returned, up to the present moment. The course of proceeding was this: With a sum of money (which, in this instance at least, was taken from a public account) stamps were bought at a discount, for which the patentees afterwards paid in full. With the sum so paid fresh stamps were bought, and so on, a profit being made on each purchase. This profit, we say, belongs to the Crown representing the public, on the principle that the moneys so used were public moneys, of which the Defendant was trustee.

The VICE-CHANCELLOR:—Do you say that if the Defendant with his own money bought stamps, and made a profit, he would be accountable for that?

Sir *R. Palmer*:—We present this case as one in which the Crown asks no account of anything received by the purchase of stamps with the Defendant's own money.

The money standing to the ear-marked account at *Coutts'* was as much public money as if it had been paid into the Exchequer; and the Defendant was not at liberty to use a shilling of it as his own: *Pennell* v. *Deffell* (1); *York and North Midland Railway Company* v. *Hudson* (2).

The question of the 12*s.* 10*d.* allowance depends upon the construction of the statute. Prior to August, 1833, the fees were taken

(1) 4 D. M. & G. 372.

(2) 16 Beav. ~~48, 49.~~ 485

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by the officer. From that date the Clerk of the Patents was to receive a salary of £400 "in full satisfaction for the duties" of the office, and "of all expenses incident to the performance thereof." We say that these payments were "expenses" of the office as well after 1844 as before.

As to the general question of jurisdiction, that this Court has as complete and perfect a jurisdiction in matters of account as the Court of Exchequer, is shewn by *Sawyer* v. *Vernon* (1); *Attorney-General* v. *Corporation of London* (2).

Mr. *D. Seymour*, Q.C., and Mr. *J. N. Higgins*, for the Defendant:—

Taking the "discounts on stamps" question first, we say that the Defendant, when he purchased these stamps, purchased them as the agent of the patentees, not as the agent of the Crown representing the public. There is no suggestion that he ever used moneys taken from the Patent Office Account, except in the single instance of the cheque of the 23rd of August, 1853.

[The VICE-CHANCELLOR:—There is no proof in the case, as far as I know, of any sum being taken from the account, other than the £500.]

But, further, the Patent Office Account was not a public account, and the Defendant was not a trustee of public money, but stood in a different position—namely, that of an accountant to the Crown. It is the practice of County Court registrars, officers who pay fees to the Suitors' Fee Fund, and officers accountable to the Treasury, to keep at banks in their own names separate accounts of the public moneys received by them. This usage, being known to the Crown, amounts by acquiescence to authority sufficient to render this information unsustainable.

As to the 12*s.* 10*d.* question. Engrossing and illuminating the patents were not among the clerk's duties. Nor can this 12*s.* 10*d.* be called either a "fee" or an "emolument." The Crown can take no part of the payments to the clerk which was neither a fee nor an emolument. The patent agent might have gone elsewhere; with that the Crown has nothing to do.

(1) 1 Vern. 370.
(2) 8 Beav. 270; on app. 1 H. L. C. 440, 447, 469, 470.

It is inequitable for the public to ask for repayment of moneys which were spent for the convenience of the public.

There is a speedy and inexpensive tribunal, established by Act of Parliament, where more substantial justice can be done between the parties than in this Court; namely, the Court of Commissioners of Audit. The Crown advisers should have betaken themselves thither. The right of an Accountant to the Crown to have his accounts taken before the Commissioners of Audit is a privilege; and is part of the implied contract between every servant of the Crown and the Crown itself: 25 Geo. 3, c. 52, ss. 9, 10, 18, 19; 39 & 40 Geo. 3, c. 54, ss. 12, 13; 29 & 30 Vict. c. 37, ss. 33–36, 43; *Manning's* Revenue Exchequer (1); Report of Select Committee of House of Commons on Public Moneys, 1856 (2).

But, besides this, the paramount and exclusive jurisdiction of the Court of Exchequer as a Court of Equity in revenue matters, still exists; and this Court has no co-existing jurisdiction: *Manning's* Revenue Exchequer (3); *Adams* v. *Fremantle* (4); *Price's* Law of Exchequer (5): *Ex parte Colebrooke* (6); *Colebrooke* v. *Attorney-General* (7); *Attorney-General* v. *Hallett* (8); *Attorney-General* v. *Halling* (9).

If the view of the information be correct, every receiver of revenue, every tax-gatherer, is liable to a suit in Equity on the ground of his being a trustee. But if he has the liabilities of a trustee, will it be maintained that he has also the reciprocal rights of a trustee? Could this Defendant have paid these moneys into the Court of Chancery under the *Trustee Relief Act?*

The York Buildings Company's Case (10), is an express *dictum* by Lord *Hardwicke*, that "an account between the King and a subject cannot be taken in any case in this Court; but in the Exchequer only."

These charges are indictable offences: *Rex* v. *Bembridge* (11); *Rex* v. *Lord Melville* (12); *Rex* v. *Valentine Jones* (13)..

(1) App. 284, 289, 290.
(2) Page 419, Q. 4293.
(3) App. pp. 102, 103; also 190, 191.
(4) 2 Ex. 433.
(5) Pref. p. xvii.; also pp. 220, 231, 240, 251, 596.
(6) 7 Price, 87, 97, 133.
(7) 7 Price, 146, 171, 175, 178.
(8) 15 M. & W. 97, 102.
(9) Ibid. 687, 691.
(10) 2 Atk. 56.
(11) 22 State Trials, 154, 156, 157.
(12) 29 Ibid. 549.
(13) 31 Ibid. 251.

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[The following authorities were also cited on the question of jurisdiction: 33 Hen. 8, c. 39, ss. 55, 56, 57; 6 Anne, c. 26, s. 1; 19 & 20 Vict. c. 56, s. 14; *Dillon* v. *Burton* (1); *Brown* v. *Trant* (2); *Brown* v. *Bradshaw* (3); *Makepeace* v. *Needler* (4); *Hovenden* v. *Lord Annesley* (5); *Sharpe* v. *McLeod* (6); *Spence's* Equitable Jurisdiction (7); *Gilbert's* View of the Ex. (8); *Attorney-General* v. *Lindegren* (9); *Chitty's* General Practice (10); *Archbold's* Practice (11).]

[On the question of how far accountants are permitted to use money in their hands, provided they are ready at any moment when called upon to produce and pay in full the amount due from them, several passages in the report of *Rex* v. *Lord Melville* (12), were referred to.]

The *Attorney-General*, in reply —

We do not say there is not jurisdiction in the Court of Exchequer; but the taking of the account must have been referred to the Remembrancer or the Master of that Court, and that could not have been so conveniently done there as here. It is obvious that the *York Buildings Company's Case* (13), which was a creditor's suit, referred to the question of how far the subject has a right to choose his Court as against the Crown.

But, first, this Court has jurisdiction in matters of account; and, secondly, the Crown has the privilege of choosing its own Court: *Chitty* on Prerogative (14). The *dictum* in *Attorney-General* v. *Halling* (15) is not to be overlooked; but another *dictum* occurs in *Burgess* v. *Wheate* (16), where it is plain that an objection like the present was scouted by the Master of the Rolls. The judgment of the House of Lords in *Corporation of London* v. *Attorney-General* (17), explains *Attorney-General* v. *Halling*, and is conclusive on the whole question.

(1) 3 Ridg. P. C. 80, 101.
(2) 2 Vern. 426.
(3) Vin. Abr. Prerog. M. 3; Extent in Aid, 6 (n), p. 529.
(4) Bunb. 291.
(5) 2 Sch. & Lef. 607, 617.
(6) 23 Sess. Cas. 2nd Ser. 1015, 1028.
(7) Vol. i. p. 649.
(8) Page 8.
(9) 6 Price, 287.
(10) 3rd Ed. vol. ii. p. 453.
(11) 12th Ed. vol. i. p. 2.
(12) 29 State Trials, 1210—1212, 1224, 1469, 1470, etc.
(13) 2 Atk. 56.
(14) Chap. xii. p. 244.
(15) 15 M. & W. 696.
(16) 1 W. Bl. 131.
(17) 1 H. L. C. 470.

As to the statutes relating to audits, there is nothing in them to shew that any prior jurisdiction has been taken away from the Court of Chancery, or any other Court.

SIR G. M. GIFFARD, V.C.:—

I shall confine the observations which I make upon the case entirely to the matters before me, and not travel into anything except that which appears on those materials.

In one respect, I am happy to say, that the arguments and the evidence adduced on behalf of Mr. *Edmunds* have been successful; that is to say, they have been successful, I think, in clearing his character from all imputation. They have satisfied me that his liability, whatever it may be, is a liability from mistake, mistake under circumstances of very considerable difficulty, brought about in some respects because he could not obtain the audits which he asked for, I think in 1834, and subsequently in 1852 or 1853, and brought about also by what is a most unfortunate Act of Parliament, passed with reference to a given state of circumstances, when, in point of fact, those circumstances changed very materially afterwards.

Having made that preface, I may add that it is not without regret that I have come to the conclusion that in other respects the arguments which have been adduced on behalf of the Defendant are not successful. I think there is jurisdiction in this Court; I think that the direction asked with reference to stamps must be given in the form which I will presently state. I think also that the Crown is right with reference to the parchments, and that as to the three minor points, the Exchequer fees, the Suitors' Fee Fund, and the imprested money, if there is any settled account, the ordinary form which is introduced into decrees for accounts will meet the justice of the case, that is to say, that no settled account will be disturbed.

With respect to the question of jurisdiction, the first thing one has to observe is this: I will take the liability under the Act of Parliament. Under the Act of Parliament what was Mr. *Edmunds*' position and liability? It was just this:—he was a paid agent for the purpose of receiving money—a paid agent for the purpose of retaining and keeping money—a paid agent for the

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purpose of paying over certain moneys, and at no time and in no sense were those moneys his, and therefore he comes within exactly that description of agent which Lord *Cottenham* refers to in the case of *Foley* v. *Hill* (1), where he draws the distinction between the position of a banker and the position of an agent of that kind. *Foley* v. *Hill* was a case where a bill was filed against a banker, and Lord *Cottenham* said this (2): "No case has been produced in which that character has been given to the relation of banker and customer, but it has been attempted to be supported by a reference to other cases supposed to be analogous. These are cases where bills have been filed as between principal and agent, or between principal and factor. Now, as between principal and factor there is no question whatever that that description of case which alone has been referred to in the argument in support of the jurisdiction, has always been held to be within the jurisdiction of a Court of Equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee the factor, as the trustee for the particular matter in which he is employed as factor, sells the principal's goods and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another; and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and therefore in these cases the Courts of Equity have assumed jurisdiction."

Now those observations of Lord *Cottenham*'s, if we were dealing with a case as between subject and subject, would be clearly applicable to this case, and it certainly would be rather an astonishing proposition, if it could be said that this Court had jurisdiction as between subject and subject, but that this Court had not jurisdiction because there happened to be an information at the instance of the Crown, and the proceedings were not between subject and subject. I should have been astonished if any authority to that

(1) 2 H. L. C. 28. (2) 2 H. L. C. 35.

effect could have been produced, and certainly none has been produced. That *dictum* in *Atkyns*, which has been referred to, obviously was a case of a subject proceeding against the Crown. The case of the *Attorney-General* v. *Halling* (1), to my mind, is not a decision to any such effect. The decision in that case was simply a decision that the Act of the 5 Vict. c. 5 had not taken away the equitable jurisdiction of the Court of Exchequer, and I do not think that the Lord Chief Baron, in going through a very elaborate judgment as to the origin of that jurisdiction, at all meant that there was exclusive jurisdiction in the Court of Exchequer; all that he meant was, that there was a complete and entire jurisdiction in the Court with reference to that particular matter —that particular matter not being the Crown proceeding against a confidential officer, but the Crown proceeding for duties by way of account. He said (2): "We think it never could have been the intention of the Legislature to leave this Court as a Court of revenue, with a maimed and insufficient authority to decide equitably in matters of revenue between the Crown and subject, and to send the subject into the Court of Chancery for such relief, leaving him, however, to be charged in the Court of Exchequer, and thus subjecting him, therefore, to be harassed by an application to both Courts. Nor would it, we think, be very seemly for the Court of Chancery to interfere, in a matter of revenue, with a Court which, from time immemorial, has held exclusive jurisdiction in such matters, and this, too, in cases in which the Court of Chancery must itself govern its proceedings by precedents to be found only in our records. The contrary construction would limit the Crown in the choice of its Court, and would reduce it to the situation of being unable to obtain full justice in one Court alone. This very case shews it." Now, what he really says is this, that if the equitable jurisdiction were taken away, you would have proceeded for these duties by way of some legal proceeding where you could not have filed a bill for discovery, and then you would have had to go into the Court of Equity in order to file a bill of discovery, and in that way the Court of Equity would have interfered with revenue proceedings in the Court of Exchequer. But I find nowhere any suggestion that if you had a case which was proper

(1) 15 M. & W. 687. (2) 15 M. & W. 699.

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for the ordinary jurisdiction of the Court of Equity, there the jurisdiction of the Court of Equity was excluded because the Defendant happened to be a subject accountable to the Crown. There really is no reason why that should be so. I asked the question whether there were any recognizances or anything of that sort in the Court of Exchequer which this Court could not discharge. The answer was that there was no recognizance of any kind. A decree for an account in this Court would, beyond all question, be a complete discharge.

I think, without going further, this would be enough to shew that there is plenty of jurisdiction in this Court. But really and truly the authority of the House of Lords is quite conclusive on the subject, because the whole decision of the House of Lords in the case of *Attorney-General* v. *Corporation of London* (1) turned entirely upon this: it was a demurrer, and the noble Lords expressed no opinion as to Lord *Langdale's* view of the Act of Parliament, but selected from the bill a particular passage, which was an allegation to the effect that the corporation were bailiffs for the Crown, and had received moneys for the Crown by reason of the licenses which they had granted, and supported the information as asking an account in respect of the moneys which they had so received. In principle, I can see no distinction whatever between that case and the present, and, therefore, if I had not formed an opinion of my own I should have considered myself concluded by that case.

With reference to the Acts of Parliament, sentences from text books, and so forth, which have been quoted, they do not go beyond this, that they shew the Court of Exchequer has jurisdiction. But in order to shew that the Court of Chancery has no jurisdiction, you must shew not only that the Court of Exchequer has jurisdiction, but that, by some enactment or other, the jurisdiction of the Court of Chancery is taken away. No such enactment has been produced, and no authority to any such effect has been produced; and this being a case which, as between subject and subject, would clearly be within the jurisdiction of a Court of Equity, I am perfectly clear that the Crown has a right to come here and file an information for an account.

(1) 1 H. L. C. 440.

The next question is, the stamps and discounts. Part of the information is wrong upon that subject. I am clearly of that opinion. The evidence shews what is the habit in a great many public offices; that is, that the Inland Revenue will sell stamps to any person who chooses to go there, and that in a great many public offices, persons out of their own money buy stamps, and get a profit by retailing them.

In this case it certainly was no part of the duty of Mr. *Edmunds*, or any one in the Patent Office, to have stamps ready, or to buy stamps, or to supply stamps. Therefore, as far as any profit was made by the application of Mr. *Edmunds*' own money to the purchase of stamps, for that, I am satisfied he is not liable. It was not part of the duty which he had to perform; it was something apart from it, and he had a perfect right to make that profit. But the case is different when you come to the application of public moneys for that purpose. When you come to the application of public moneys for that purpose there intervenes this rule, which is universal in this Court, namely, that if you have money of another person in your hands which belongs to that other person, and which you have no right to use for your own purposes, if you do apply that money to purposes which are not warranted by your trust, if there is a loss you lose, and if there is a gain, the person who is entitled to the money is entitled to the profit. Therefore, I think, to that extent, Mr. *Edmunds* is liable in respect of any profits that may have been made by the purchase of stamps, but not in respect of any profits that may have been made by the purchase of stamps completely and entirely with his own money.

Then comes the third question, which is upon the construction of the Act of Parliament. It is only necessary to refer to very few portions of the Act. I do not think the recital upon which Mr. *Higgins* relied, "And it is desirable that the persons to be appointed to discharge the duties of such offices shall be paid by fixed salaries for such their trouble," advances the case. The 4th section, I think, is material. I may say, before I go to the 4th section, that the whole scheme of the Act was this: to have all the fees and emoluments that were antecedently received for the profit of the officers handed over and paid into the Exchequer, and to pay

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the officers a salary, leaving them no profit whatever in the fees and emoluments. The 4th clause enacts, "That from and after the 20th day of August, 1833, as to the said office of Clerk of the Letters Patent, and from and after the death, resignation, or removal respectively of the several holders of the several offices, there shall be paid to the Clerk of the Crown in Chancery the yearly salary of £800; to the Clerk of the Patents the yearly sum of £400; to the Secretary of Lunatics, for expenses attending the office of Clerk of the Custodies of Idiots and Lunatics, the yearly sum of £200; to the Purse Bearer, the yearly sum of £50." Then there are also provisions for the expenses of other officers. The 6th section says this: "And be it further enacted, that the said several salaries shall be taken in full satisfaction for the duties of the said offices respectively, and of all expenses incident to the performance thereof." Then we have the 7th section, and if the 7th section means anything, it does mean that the fee or emolument which was ordinarily and usually received from the public should be paid over without deduction to the Exchequer, and the terms of the section are as follow: "And be it further enacted, that it shall and may be lawful for the several persons who by virtue of this Act shall hereafter hold or perform the duties of the said several offices of Keeper or Clerk of the Hanaper, Clerk of the Crown in Chancery, Clerk of the Patents," and so on, "to have, receive, and take all and every the fees and emoluments which have been accustomed to be paid, and which of right ought to be paid to the said several officers respectively, or to any deputy or clerk of such several officers, in respect of the said several offices, as the same would have been payable if this Act and the said recited Act had not been passed, and that such fees and emoluments shall be accounted for once in every three months, commencing, in the first instance, from the date of such appointments respectively, and shall be paid by the said officers respectively into the receipt of His Majesty's Exchequer, and be carried to and made part of the Consolidated Fund of the *United Kingdom*." They are to be paid by the officers into the Exchequer. With regard to what is a fee and emolument, the evidence is entirely one way. There is but one fee and emolument which is ever spoken of, or appears to have existed in the office at all. It was a sum of £6 8s. 4*d*., and the

Attorney-General read from the evidence that that was the fee and emolument which was always paid by the public.

That being so, I cannot—I am sorry for it, as I think it is a case of considerable hardship—I cannot put any other construction upon this Act of Parliament, than that the person who received that fee and emolument was bound to pay over that fee and emolument to the Exchequer. I must necessarily, therefore, direct an account with declarations, and the account and declarations will be in this form,—First of all, refer it to Chambers to take an account of all fees and moneys received by the Defendant, or by any person on his behalf, as Clerk of the Patents and as Clerk of the Commissioners of Patents, since the date of his appointment; and also of all moneys received by him or by any person on his behalf from the Lords of the Treasury for the expenses of the office of Clerk of the Commissioners of Patents; and of the application by the Defendant of all such fees and moneys respectively. I shall then direct that in taking such account all just allowances are to be made, and in case of any settled account, the same is not to be disturbed. Then I shall make these declarations—declare that, in taking such account, the Defendant ought to account for all profit made by the purchase and re-sale of stamps in so far as such purchases originated in or emanated either originally or otherwise from any moneys drawn from the Patent Office Account. I must also declare that he is not entitled to make any deduction whatsoever for or in respect of the parchment used in the preparation or engrossment of any document issued by him as Clerk of the Patents, or from the office of the Clerk of the Patents, or any other deduction whatsoever in respect of the preparation and engrossment of any such document.

It is with regret that I find myself compelled by the terms of the Act of Parliament to make that last declaration. I repeat, as I said at the outset, that I think the Defendant's evidence has removed any imputation that can be justly or fairly cast upon his character, and, having regard to all the circumstances, the very difficult position in which he was placed, and the fact of the audits being refused, I certainly shall not make him pay any costs.

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July 15. On the case being mentioned to-day on minutes, the declaration as to the stamps was settled in the following form:—

Declare that in taking such account the Defendant ought to be charged with and to account for all profits (if any) made by him on any stamps purchased by him or under his authority, and affixed to patents or other instruments issued from the office of the Clerk of the Patents, or from the office of the Commissioners of Patents, for inventions, so far as such stamps were purchased with or by the use of any moneys drawn from the Patent Office Account in the pleadings mentioned; or with or by the use of any other moneys for which the said Defendant was liable to account to Her Majesty.

Solicitors for the Informant: Messrs. *Raven & Bradley.*
Solicitors for the Defendant: Messrs. *Ashley & Earle.*

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May 3, 5; June 1.

In re TRENT AND HUMBER COMPANY. *Ex parte* CAMBRIAN STEAM PACKET COMPANY.

Damages, Measure of, for Breach of Contract—Profits—Winding-up—Companies Act, 1862, s. 158—*General Order of Nov.* 1862, *Rule* 25.

In April, 1865, company *A.* entered into a contract with company *B.* to repair a steamship within the period of sixteen weeks from the 1st of April, 1865, for £1950. On the 7th of August, 1865, an order was made for winding up company *A.* At this time the repairs of the ship were not completed, and the period (which had been extended to twenty weeks in consequence of a lock-out in the iron trade) had not expired. After some delay, the repairs were completed by the official liquidator of company *A.* under orders obtained in the winding-up, and in May, 1866, the ship was delivered to company *B.*

Damages having been claimed by company *B.* for loss of charterparties and depreciation in value of the ship between the time fixed by the contract for her completion and the time of her actual delivery:—

Held, 1, that the claim was not barred by s. 158 of the *Companies Act*, 1862, nor by the 25th rule of the General Order under that Act; and 2, following *Cory* v. *Thames Ironworks Company* (1), that the damages recoverable would be the net profit which company *B.* might have obtained by chartering the vessel if she had been delivered at the time fixed by the contract instead of in May, 1866.

ADJOURNED summons on behalf of the *Cambrian Steam Packet Company, Limited*, for proof against the *Trent and Humber Shipbuilding Company, Limited*, in course of being wound up: 1. For £2000 damages sustained by the *Cambrian Company* by reason

(1) Law Rep. 3 Q. B. 181.

of the non-delivery by the *Trent and Humber Company* of the steamship *Plynlymon* at the time stipulated in the contract for repairing her entered into by the *Trent and Humber Company*; 2. For £2500, for loss consequent upon the depreciation in value of the vessel by reason of her non-delivery at the proper time; 3. For £3184 9*s.* 6*d.* expended in surveying and repairing the *Plynlymon*, in consequence of the damage sustained by her while lying on the slip in the premises of the *Trent and Humber Company* at *Gainsborough*, through the repairs and alterations made by that company having been improperly carried out.

On the 6th of April, 1865, the *Trent and Humber Ship-building Company* entered into a contract with the *Cambrian Steam Packet Company* to perform the several works in and about their steamship *Plynlymon* enumerated in the specification, in a good and workmanlike manner, and of the best materials, to the satisfaction of Mr. *John Grantham*, or other consulting engineer for the time being of the *Cambrian Company*, within the period of sixteen weeks from the 1st of April, 1865 (subject nevertheless to any delay arising from the lock-out in the iron trade), for £1950, to be paid by the *Cambrian Company* to the *Trent Company*, on completion of the work (to the satisfaction of *Grantham*, or other the consulting engineer, to be evidenced by his certificates in writing under his hand), by acceptances of the company, renewable at the cost of the *Trent Company*, equal to twelve months' credit from the date of such completion as aforesaid; such acceptances being collaterally secured by a first mortgage of the steamer *Aberystwyth*. It was also provided that the *Trent Company* might at any time during the progress of the works draw upon the *Cambrian Company* so as not to exceed the amount in value of work at the time completed; such bills to be renewed at the drawers' expense for such period as should be equal to twelve months' credit from the time of completion.

Soon after the date of the agreement there was a lock-out in the iron trade, which caused a delay of about four weeks in the delivery of the iron necessary for completing the repairs and alterations.

On the 21st of July, 1865, a petition was presented for the winding-up of the *Trent and Humber Company*, and on the 7th of August a winding-up order was made by Vice-Chancellor *Wood*.

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In re Trent and Humber Co. *Ex parte* Cambrian Steam Packet Company.

On the 17th and 28th of August, 1865, *Crealock*, managing director of the *Cambrian Company*, wrote to inquire when the *Plynlymon* would be ready for delivery, stating that the delay was serious, as negotiations were pending for a charter, and he should have to hold the company responsible for the consequences.

A long correspondence followed, in the course of which the official liquidator stated that he had no funds for completing the *Plynlymon*, while the *Cambrian Company* declined to furnish any. The four months' bill for £400 by which the first instalment of the money payable under the contract was paid, was not renewed by the *Trent Company* when it became due on the 9th of October, and *Crealock* being sued upon it, judgment was recovered against him for the amount, with costs, and a *fi. fa.* taken out thereon.

On the 30th of October, 1865, the *Cambrian Company* took out a summons in Chambers (Vice-Chancellor *Wood*) that instructions might be given as to the necessary and proper steps to be taken for carrying out the contract, and for the recovery of damages for non-performance, but the Chief Clerk declined to make any order on this summons, and also on another summons taken out by the *Cambrian Company* for leave to commence proceedings at common law against the official liquidator for non-performance of the contract.

On the 12th of December, 1865, an order was made, on the application of the official liquidator (who was then possessed of sufficient funds) that he be at liberty to complete the repairs and alterations to the *Plynlymon* pursuant to the contract of the 6th of April, 1865.

On the completion of the works in May, 1866, an order was made for delivery, by the official liquidator, of the *Plynlymon* to the *Cambrian Company*, on receiving from them a first mortgage on the *Aberystwyth* for £1950, such mortgage to be enforced at such time and for such sum only as should be found to be due under the contract from the applicants to the official liquidator, but the order to be without prejudice to the respective rights of the official liquidator and the applicants under the contract at law or in equity, or otherwise in any respect whatsoever.

In pursuance of this order the *Plynlymon* was, on the 17th of May, 1866, delivered over to the *Cambrian Company*, and a mort-

gage upon the *Aberystwyth* for £1950, in favour of the official liquidator, was handed over to him.

On the 26th of July, 1866, on application by the official liquidator for payment of the balance claimed from the *Cambrian Company* in respect of repairs, the Chief Clerk held that the contract must be adhered to, and that the *Cambrian Company* were entitled to twelve months' credit from the date of completion.

At the expiration of the twelve months, in May, 1867, the official liquidator took out a fresh summons for enforcing payment of the mortgage upon the *Aberystwyth*. This summons was met by a set-off on behalf of the *Cambrian Company*, who claimed £2000 for damages by reason of the non-delivery of the ship by the *Trent Company* until ten months after the stipulated time (at the rate of £200 a month, the net profit that would have been earned by chartering her at the then Government rate, and interest), and interest upon the monthly profit at the rate of 15 per cent. per annum, and various other items.

The summons was adjourned into Court, and on the 24th of July, 1867, Vice-Chancellor *Wood* made an order that the applicant (the official liquidator of the *Trent and Humber Company*) be at liberty to proceed to realize the mortgage debt of £1950, after deducting therefrom £400, amount of bills of exchange, and £31 19*s.* 11*d.* for interest thereon at £5 per cent. from the 9th of October, 1865, to the 15th of May, 1867, and £5 for costs at law, and £33 13*s.* 10*d.* for old materials, making together the sum of £470 13*s.* 9*d.*, and that the *Cambrian Steam Packet Company* be at liberty to go in under the order dated the 7th day of August, 1865, for winding up the *Trent and Humber Ship-building Company, Limited*, and prove in respect of any damage that might have accrued to them from the delay in the completion of the contract of the 6th of April, 1865, regard being had to the arrangement made by consent of the parties under the order of the 15th of May, 1866, and that the costs of the applicant of that application, and consequent thereon, be taxed by the Taxing Master, and be paid out of the assets of the *Trent and Humber Company* (1).

(1) In the course of his judgment, Sir *W. Page Wood*, V.C., made the following observations in reference to the argument on behalf of the official liquidator, that the claim on behalf of the *Cambrian Company* was excluded by

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On the 3rd of October, 1867, the *Cambrian Company* brought in their claim for £2000 damages sustained by the non-delivery of

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sect. 158 of the *Companies Act*, 1862, and by the 25th rule of the General Order of November, 1862:

"With respect to sect. 158 (*Companies Act*, 1862), I am rather inclined to the view that all creditors having claims which they cannot at the time establish as debts certain, but which still remain uncertain, have the power of making claims and proving the debts, irrespective of the circumstance of the debts being contingent, and there being no means at present for ascertaining them. The 25th rule only follows that, and says that the value of the debt must be estimated, so far as is possible, according to the value at the date of the order to wind up the company. It would not prevent any creditor who prefers to wait and see if the event takes place upon which the contingency is determined, from doing so, unless the time for bringing in claims has expired. When the debt has become ascertained, there is nobody to say he can't prove it. But cases of this description are rather different. This is a case of damage not yet ascertained, and how is the Court to deal with a question of this kind? What is the proper mode of ascertaining the debt? I am pressed with the consideration, that under the 25th rule of the General Order if a person chooses to prove his debt in that way an estimate shall be made of the value of such claim at the time when the winding-up takes place. I apprehend that even that would not exclude the Court from ascertaining the damage when the contract was to be performed within a specified time. If it were to be performed, say next week, or in six weeks, and the damage, if it were not performed within that time, would be great, could the Court say there should be no relief because the contingency might be next to nothing, or taken as nothing, and because the time had not arrived at the date of the winding-up for performance of the contract, and there was no *constat*, it would not be performed afterwards. The Court would not be in a position to say that there was to be no remedy because the time had not arrived for the performance of the contract. The clause in the *Bankruptcy Act*, 1861, s. 153, is differently worded where it speaks of the liability of the bankrupt at the time of the bankruptcy. No liability exists where there is no breach at the time of the bankruptcy, and the result is, that it not being provable under the bankruptcy, the bankrupt remains liable; the certificate does not cover it. The right is to have some inquiry at Chambers to meet the justice of the case. I cannot think it just that the company should have the full price of the contract as if everything had been done, and the *Cambrian Company* had suffered no inconvenience or delay. On the other hand, I don't take this extravagant and ridiculous estimate of their damage; and therefore all I can do upon the present occasion is to make an order such as I have proposed as to the mortgage, making the allowances I have mentioned, giving the liquidator liberty to proceed to enforce the mortgage for the amount less those deductions, but to let the *Cambrian Company* be at liberty to make such claim as they may be advised in respect of the damage that has accrued to them from the delay in the completion of the contract, regard being had to the arrangement made by the consent of the parties under the order of the 15th May, 1866.

the ship at the stipulated time. The Chief Clerk was of opinion that this claim could not be allowed, but thought that the *Cambrian Company* were entitled to some compensation, and that it ought to be valued according to the principle of forbearance of interest during the time of the actual delay in delivering the ship. The further hearing of the claim was adjourned, and on the 17th of December, 1867, new items of claim (being those mentioned at the commencement of the statement as 2 and 3), were carried in on behalf of the *Cambrian Company*. It was objected on behalf of the official liquidator that the *Cambrian Company* could not bring in any fresh claim at so late a period, but this objection was disallowed by the Chief Clerk.

The case now came before the Court by adjourned summons.

Evidence was adduced, upon the first branch of the claim, of charterparties which might have been effected by the *Cambrian Company*, and were actually in negotiation, but had to be broken off owing to the non-delivery of the *Plynlymon* in August, 1865, and also of a depreciation in the marketable value of ships between August, 1865, and May, 1866, amounting to from 40 to 50 per cent., and rendering it almost impossible to charter steamers of this class at a rate more than sufficient to pay their working expenses. In reference to the third branch of claim, evidence was given by Mr. *Grantham*, the consulting engineer of the *Cambrian Company*, to the effect that the floors of the new part of the vessel supplied by the *Trent Company* were found upon inspection at *Liverpool* to have been broken, and the stanchions bent from a deflection in the bottom of the vessel, which coming in contact with the level blocks of the graving dock, had caused this part to be forced upwards, and thus broke her floors. This deflection was ascribed by *Grantham* and others, on behalf of the *Cambrian Company*, to a subsidence (from its being constructed on loose muddy soil) of the slip on which the *Plynlymon* was placed in the dock of the *Trent Company* at *Gainsborough;* and it was stated that resting on such a soil for thirteen months was enough to make her lose her correct form. It was also stated by way of explaining Mr. *Grantham's* not having sooner discovered the defect, that when he saw her at *Gainsborough* the steamer appeared fair and straight, but that she was at the time so obstructed by blocks

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and supports that it was impossible to see in what condition she was as to her lines. This evidence was contradicted by witnesses on the other side, who described the foundation and construction of the patent slip-way at *Gainsborough*, on which the *Plynlymon* was placed, and the consequent impossibility that any subsidence such as was described by *Grantham* could have taken place in it.

Mr. *Druce*, Q.C., and Mr. *Babington*, for the *Cambrian Company*, in support of the summons:—

The *Cambrian Company* is entitled to compensation for the loss of charterparty and also for the depreciation in the value of the ship arising from the breach of contract by the *Trent Company*, and the improper detention of the *Plynlymon* in their dock at *Gainsborough* more than nine months after the time fixed for the completion of her repairs. We shew that we had in contemplation a charterparty for the ship at the rate of £320 a month, and although it is admitted that we cannot recover from the *Trent Company* the whole rate of freight which could have been obtained on a contract so special in character, we claim that which represents the mean ordinary rate of freight during the period for which the default of the *Trent Company* has deprived us of the use of the ship; in other words, the average profit which would result from the ordinary use of the article for the purpose to which the *Trent and Humber Company* understood and believed it would be applied: *Cory* v. *Thames Ironworks Company* (1). The proximate cause of damage is distinctly traceable to the *Trent and Humber Company*, and according to the judgment of *Martin*, B., in *Wilson* v. *Newport Dock Company* (2), who declined to adopt the qualifications mentioned by *Alderson*, B., in *Hadley* v. *Baxendale* (3) as of universal application, the decision in *Hadley* v. *Baxendale* is not an authority "that loss of profits is not a legitimate element of damages in many other cases; for instance, in a railway accident whereby a tradesman or workman is prevented from attending to his business by the injury sustained. The loss of profits in such cases is a constant element of damages;" the rule being that the damage must be proximate (not immediate), and fairly and reasonably

(1) Law Rep. 3 Q. B. 181. (2) Law Rep. 1 Ex. 184. 12 Jur N
(3) 9 Ex. 341. 10 Jur 359

connected with the breach of contract or wrong. Applying that principle, which has been confirmed by the Court of Queen's Bench in *Cory* v. *Thames Ironworks Company* (1), the *Cambrian Company* is entitled to the amount claimed by them.

With respect to the depreciation in value of the ship, if, in addition to losing their charterparty, the *Cambrian Company* had received back their ship in a worm-eaten state, and this condition was distinctly traceable to her detention by the *Trent Company*, the damage thereby occasioned would be a legitimate element in estimating the amount of damage payable for breach of the contract. So again if the market value of shipping and freights has fallen so that the ship has become less valuable and less capable of being applied usefully than it was at the time of delivery specified in the contract, the damage in that respect is the ordinary, natural, and immediate consequence of the delay, for which the contractor is answerable: *Wilson* v. *Lancashire and Yorkshire Railway Company* (2); and the measure is the difference between the contract price and the market price: *Wilson* v. *Newport Dock Company* (3). With respect to the third item of claim it is clear upon the evidence that there has been gross misconduct on the part of the *Trent Company* in the way in which the repairs were executed, and the insolvent condition in which they were at the time gives confirmation to the evidence in this respect.

Mr. *Kay*, Q.C., and Mr. *J. N. Higgins*, for the official liquidator of the *Trent and Humber Company*:—

Even assuming that a clear case of delay were established as occasioned by the *Trent and Humber Company*, and that the delay had not been waived, the loss of profit to the *Cambrian Company* could not enter into the calculation of damage. The claim must be estimated according to its value at the date of the winding-up order (*Companies Act*, 1862, s. 158; General Order of the 11th of November, 1862, Rule 25 (4)).

(1) Law Rep. 3 Q. B. 181.
(2) 9 C. B. (N. S.) 632.
(3) Law Rep. 1 Ex. 184.
(4) Sect. 158 of 25 & 26 Vict. c. 89 (*Companies Act*, 1862), is as follows:—
"In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company,

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At that date no damage had resulted to the company, and their present claim must be limited to the delay necessarily involved in the winding up of the company. In the analogous case of bankruptcy, sect. 153 of the *Bankruptcy Act*, 1861, providing for the admission of a proof when a bankrupt is liable to a demand in the nature of damages which have not been ascertained, only applies to such demands in the nature of damages as are capable of being enforced against the bankrupt at the date of the adjudication: *Ex parte Mendel* (1).

The proper course, as soon as the winding-up took place, and it became apparent that the *Trent Company* would no longer carry out their contract, would have been for the *Cambrian Company* to have applied to the Court for leave to complete the repairs themselves, or get them done elsewhere, and then claimed the amount against the *Trent Company* under the winding-up. The delay was on their side. Were they entitled to let the vessel remain unfinished for years, and then bring in new claims from time to time for continuing breaches? To maintain any such claim it must be shewn that the contract was of that special nature that it could not be performed elsewhere. If, however, the repairs could be done elsewhere, and performance of the contract by the original contractors had become impossible, the person seeking damages was not entitled to decline to get the work completed and increase his claim for damages on the ground of a delay which was attributable to himself only. But, in any case, the possible profits that might be made by the use of an article have never been allowed to be made the measure of damages for non-delivery of the article.

According to *Hadley* v. *Baxendale* (2), a Defendant is not liable except for such damages "as may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of

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a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency, or sound only in damages, or for some other reason do not bear a certain value."

The 25th rule of the General Order under the *Companies Act*, 1862 (11th of November, 1862), is as follows:—"The value of such debts and claims as are made admissible to proof by the 158th section of the said Act shall, so far as is possible, be estimated according to the value thereof at the date of the order to wind up the company."

(1) 1 D. J. & S. 330. 10 Jur. (N.S.) 359

(2) 9 Ex. 341, 354. 10 Jur. 359

things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it," and applying that principle, it was laid down that the loss of profits alleged to have resulted from the non-performance of the contract could not be taken into consideration at all in estimating the damages. The principle is also thus stated in *Mayne* on Damages (1):—"As a general rule the primary and immediate result of the breach of contract can alone be looked to. . . . The principle of all these cases seems to be, that in matters of contract the damages to which a party is liable for its breach ought to be in proportion to the benefit which he is to receive from its performance. Now this benefit, the consideration for his promise, is always measured by the primary and intrinsic worth of the thing to be given for it, not by the ultimate profit which the party receiving it hopes to make when he has got it. It is obviously unfair, then, that either party should be paid for carrying out his bargain on one estimate of its value and forced to pay for failing in it on quite a different estimate. This would be making him an insurer of the other party's profits without any premium for undertaking the risk." In the estimate of profits put forward by the *Cambrian Company* no deduction for insurance, commission, or wear and tear, is made, and the ship is assumed to be fit in all respects, and capable of earning the amount, whereas that is not shewn by the evidence. Looking at the whole amount payable to the *Trent and Humber Company* under the contract (£1950), this claim by the *Cambrian Company* for £7500 is preposterous, and ought not to be entertained by the Court. Upon the second and third branches of claim the evidence adduced by the official liquidator negatives the theory that the deflection was occasioned by any subsidence in the slip-way. The repairs were made according to *Grantham's* specifications, and subject to his approval; and it was not until nearly a year after the *Plynlymon* had been delivered to the *Cambrian Company* that these alleged defects were discovered. Further than this, the claim for depreciation in value and injury by straining is altogether inconsistent with the claim for loss of profits, and they cannot be asserted together.

(1) Page 6.

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[Attention was also called to the very late period at which the additional items of claim (2 and 3), were raised.]

Mr. *Druce* in reply :—

The *Trent and Humber Company* bound themselves specifically not to detain the ship beyond the period of sixteen weeks from the 1st of April, 1865 ; and as they have broken their contract and thereby occasioned loss to the *Cambrian Company*, that loss must be made good. And if by their default they have inflicted upon the *Cambrian Company* damage ten-fold in amount to what they would have received under the contract, the damages to be recovered by the *Cambrian Company* cannot be limited to the amount payable under the contract. The objection to our claim based upon sect. 158 of the *Companies Act*, and the 25th rule of the General Order, having been already decided against the *Trent Company* by Vice-Chancellor *Wood*, cannot be again raised.

June 1. Sir G. M. Giffard, V.C., after stating the facts down to the order made by Lord Justice *Wood*, then Vice-Chancellor, in July, 1867, upon the application of the official liquidator, continued :—

When this order was made evidence was entered into on behalf of the *Cambrian Company* with reference to the damage they had sustained, but the evidence was then confined entirely to damages alleged to have been sustained in consequence of the delay in the delivery of the *Plynlymon*. It was not suggested that the work that had been done under the contract had not been properly done, or that the *Plynlymon* was not delivered in the state she ought to have been in according to the contract and specification.

Subsequently, the *Cambrian Company* brought a claim into Chambers for proof in respect of damages, confining it, in the first place, to £2000, by reason of the delay in delivering the vessel, but afterwards altering the claim by increasing it to a sum of £7684 9*s.* 6*d.*, that sum being made up, first, of the additional sum of £2500 for loss consequent upon the depreciation in value of the vessel by reason of her non-delivery ; and, secondly, of the additional

sum of £3184 9*s.* 6*d.*, in consequence of the damage sustained by the vessel while lying on the slip in the *Trent and Humber Company's* premises at *Gainsborough*, through the repairs and alterations made by the *Trent and Humber Company* having been improperly carried out.

According to the evidence there was a lock-out in the iron trade after the 1st of April, 1865, but before the time at which the *Plynlymon* ought otherwise to have been delivered, which lasted for the period of a month. The time, therefore, for delivery would thus be extended by four weeks, and would be twenty weeks instead of sixteen.

The money secured by the mortgage has been paid.

The claim was adjourned into Court, and came on to be heard before me. It had been argued before my predecessor that the winding-up stood on the same footing as a bankruptcy, and that the 158th section of the *Companies Act*, and the 25th rule of the General Order, excluded the claim, and that even if this were not so, proof could not be made because no suggestion of the possibility of a claim for damages was made when leave was given to complete the contract under the winding-up at the expense of the estate, although the facts were at that time known to the *Cambrian Company*, and, besides this, that the claim for loss of profits was not sustainable.

These arguments did not prevail, and the Lord Justice, as Vice-Chancellor, made the order of the 24th of July, 1867, to which I have adverted.

On the claim coming on before me, there was additional evidence; much the same arguments were adduced as had been brought forward on the former occasion, and these arguments were also directed to the additional claims, it being said as to them, as had been said before with reference to the original claims, that the facts relative to them were known when leave was given to complete the contract at the expense of the estate. If the original claims had been barred by the 158th section of the Act and the 25th rule of the General Order, the order of the 24th of July, 1867, could not have been made. I am bound to act under that order, and even if I were not, I should be of opinion that neither the 158th section nor the 25th rule bars the claims. The

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winding-up of a company is in many respects different from the bankruptcy of an individual. There is nothing in the winding-up similar to what the certificate was or the discharge now is. Notwithstanding the winding-up order, the trading may, under a variety of circumstances, be carried on by the direction of the Court in the name of the company—inchoate contracts may be completed, inchoate liabilities may be rendered absolute. Moreover, if the leave of the Court be given, pending actions and suits may be continued, and new suits or actions brought against the company, and it does not necessarily follow that a company is insolvent because it is being wound up, or that, on that account, nothing will be coming to the shareholders, and the Act applies to unlimited as well as to limited companies. It results from the order made on the 24th of July, 1867, as well as from the terms of the order of the 15th of May, 1866, that the fact of the claim not having been brought forward when leave was given to complete the contract, does not prevent the claim from being entertained; if it be entertained at all, I can see no reason why the whole should not be entertained, and this being so, it follows that each part of the claim must be dealt with on its merits.

The claim, as I have already stated, consists of three parts: First, a claim for damages for non-delivery of the vessel at the stipulated time; secondly, for depreciation in value by reason of the non-delivery of the vessel; and thirdly, for damages by reason of the repairs and alterations not having been properly carried out.

With respect to the first part of the claim, the case of *Cory* v. *Thames Ironworks Company* (1), is directly applicable, and although the contract was completed under an order of the Court, and I am to have regard to that order, I can see no distinction in principle between that case and the present. In that case the action was for damages by reason of the delay by the Defendants in the delivery of the hull of a floating boom derrick under a contract for sale, and Mr. Justice *Blackburn* thus laid down the law (2): "The measure of damages, when a party has not fulfilled his contract, is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more than that, but what might be reasonably

(1) Law Rep. 3 Q. B. 181. (2) Law Rep. 3 Q. B. 190.

expected to flow from the non-fulfilment of the contract in the ordinary state of things, and to be the natural consequences of it." Applying that principle to the present case, the damages as regards the first part of the claim will be the net profit which the company might have obtained by chartering the vessel if she had been delivered twenty weeks after the 1st of April, 1865, instead of when she was delivered on the 17th of May, 1866. The second part of the claim was but slightly pressed. It appears to me to be inconsistent with the first part of the claim, as well as with the case of *Cory* v. *Thames Ironworks Company* (1), and is, in my opinion, both on these and on other grounds, inadmissible.

As regards the third part of the claim, it is proved that there was a deflection in one or more of the plates at the bottom of the vessel; it is sworn, and not denied, that the stanchions were four or five inches longer at the centre of the vessel than at the end, and that this different length of the stanchions shews that the deflection must have existed, and did exist, before and at the time of the delivery of the *Plynlymon*. The *Plynlymon* was despatched on a voyage soon after her delivery; it is alleged that the deflection was not and could not then be discovered, and £3184 9*s.* 6*d.* is sought to be proved for as being the amount expended on the repairs of the *Plynlymon* when she returned from the voyage, it being said that this expenditure would not have been required had there not been this deflection at the bottom of the vessel. I am satisfied that the deflection existed before and at the time of the delivery of the *Plynlymon*, and, whatever its cause, that this would not have been so if the contract had been duly and properly performed. It is provided, however, by the contract that the *Plynlymon* was to be lengthened and repaired to the satisfaction of Mr. *John Grantham*, or other the consulting engineer of the *Cambrian Company*. Before the vessel was delivered Mr. *John Grantham* and the company's officers, as the evidence shews, had abundant opportunities of seeing whether the lengthening or repairs were or were not duly carried out. There was no fraud of any sort, the existence of the deflection might easily have been ascertained, and that it was not ascertained was owing to the neglect and default of the officers of the *Cambrian Company*.

(1) Law Rep. 3 Q. B. 181.

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Under these circumstances, I am of opinion that the utmost which is recoverable in respect of this part of the claim, is the amount which it would have cost to have rectified the deflection at the time when the *Plynlymon* was delivered, and before she was sent on any voyage. The materials contained in the affidavit are by no means such as to enable me to settle the amount of the claim, I must therefore refer the settlement of the amount to Chambers, with "a declaration that the *Cambrian Steam Packet Company, Limited,* are entitled to prove, first, for the amount, if any, of the net profits which, under all the circumstances, the company might have obtained by chartering the vessel if she had been delivered duly lengthened and repaired according to the terms of the contract twenty weeks after the 1st of April, 1866, instead of on the 17th of May, 1867; and, secondly, for the amount which it would have cost to have rectified the deflection in the bottom of the vessel at the time she was delivered, and before she was sent on any voyage."

The official liquidator will have his costs out of the estate. The *Cambrian Company* ought to have drawn attention to their claims when the order for leave to complete was obtained; but both then and at other times they have chosen to keep them back when they ought to have brought them forward. I shall therefore give them no costs up to the present time.

Solicitors: Mr. *C. P. Froom;* Messrs. *Oldman & Co.*

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WOOLDRIDGE *v.* NORRIS.

Principal and Surety—Indemnity—Bill quia Timet—Demurrer overruled.

A surety on a bond to secure a money debt, was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having by will devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no funds in hand, and that they were unable under the will to raise the money by sale of any portion of the testator's estate, except under a decree of the Court:—

Held that the surety, though he had not actually paid anything, was

16 L.T. 66.
16 W.R. 692.
2 Ch.D. 110
11 Ch.D. 93.
44 L.T. 130
4 Ex.D. 130
22 Ch.D. 63

entitled to maintain a bill against the executors for administration, payment of the debt, and indemnity:

Held, further, that it was not necessary that the bill should be filed on behalf of all the creditors.

IN 1858 *William Henry Veal* the younger borrowed £50 from the trustees of a charity, and the Plaintiff *Charles Wooldridge* and *Edward Tibb Hopkins*, at the request of *William Henry Veal* the elder, the father of the principal debtor, entered into a bond with the trustees for the repayment of the same.

In consideration of this bond *W. H. Veal* the elder, on the 17th of April, 1858, gave his bond to the Plaintiff and *Hopkins* for £100 each, the condition of which was, that if *W. H. Veal* the elder, his heirs, executors, or administrators, should pay to the Plaintiff, his executors, administrators, or assigns, and also to *Hopkins*, his executors, administrators, or assigns, "all such sum and sums of money, costs, damages, and expenses, which they respectively may be called upon, and be liable and compelled to pay, by reason or in consequence of their respectively having entered into and executed the first-mentioned bond, and also if the said *W. H. Veal* the elder, his heirs, executors, or administrators, will save harmless and keep indemnified the said *Charles Wooldridge*, his heirs, executors, or administrators, and also the said *Edward Tibb Hopkins*, his heirs, executors, administrators, or assigns, of and from all actions, suits, or other proceedings commenced or brought under or by virtue of the said bond, and all payments, costs, charges, damages, and expenses, which they respectively shall or may incur, sustain, or be put unto, for or in respect thereof, or in relation thereto," the bond should be void.

W. H. Veal the elder died on the 21st of June, 1865, having, by will, appointed the Defendants, *Samuel Baker Norris* and *William Polkinghorne*, executors and trustees of his will, and having bequeathed to their use the whole of his real and personal estate (except specific bequests) upon certain trusts, amongst which was, out of the proceeds of the sale of a certain house to pay the trustees of the charity £50, "if then due from him as surety for a sum advanced by them."

The bill was filed on the 15th of May, 1868, charging that "the trustees of the charity have recently applied to the Plaintiff for

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payment of the £50 secured by his said bond, and the Plaintiff thereupon applied to the Defendants to pay the same, but they allege that they have no funds in hand, and that they are unable under the will to raise the money by sale of any portion of the testator's estate except under a decree of the Court;" and praying for administration; and that the Defendants, as executors and trustees, might be directed, out of their testator's estate, to pay the said sum of £50, and to indemnify the Plaintiff against all claims under his bond.

To this bill the Defendants demurred for want of equity.

Mr. *Simmonds*, for the demurrer:—

It is laid down by Lord *Redesdale* (*Mitford* on Pleading (1)) that where a Plaintiff shews only the probability of a future title upon an event which may never happen, he has no right to institute any suit concerning it, and a demurrer to such a bill will be allowed.

In this case the Plaintiff, though he says he has, as surety, been called upon to pay, has not paid anything to the trustees of the charity. Until he has done so he has no right of action or suit against these Defendants. He could not, until he had suffered loss, have sued the testator in his lifetime; neither can he now sue his representatives.

In *King* v. *Malcott* (2) an attempt by a lessor to compel the executors of his lessee (who had assigned the lease) to set apart a fund out of his assets to provide for possible breaches of covenant, failed on the express ground that no rent was due, and *non constat* that any breach would ever be made.

The bill, moreover, should have been filed by the Plaintiff on behalf of himself and all other creditors.

Mr. *Druce*, Q.C., and Mr. *Winterbotham*, for the bill:—

The Plaintiff has, at any rate, been called upon to pay. Is it necessary for him to go to prison in order to give the Court jurisdiction? Must the testator's estate be put to all the expense of an action at law, and procuring the Plaintiff's release from prison? For out of the testator's estate all the expense must ultimately come.

(1) Page 183, 5th Ed. (2) 9 Hare, 692.

It is an established principle, that at any time after the debt becomes due, though the surety be not sued, yet he has a right to call upon the principal to discharge the debt; "it being unreasonable that a man should always have such a cloud hang over him": *Earl Ranelaugh* v. *Hayes* (1); *Lee* v. *Rook* (2); *Nisbet* v. *Smith* (3); *Antrobus* v. *Davidson* (4).

As to the argument that the Plaintiff should have sued on behalf of himself and all other creditors, the testator has charged an estate expressly with this particular debt: *Story's* Eq. Jur. (5); *Champion* v. *Brown* (6).

Mr. *Simmonds*, in reply:—

The cases cited are all cases of principal and surety. The testator here was not the principal debtor.

The trust in the testator's will is not for the Plaintiff; it is for the trustees of the charity.

June 30. SIR G. M. GIFFARD, V.C.:—

In this case the bill, which is in the nature of a bill *quia timet*, is one of a kind which is rather unusual in modern times.

The objections which were taken to it were, first, that a state of circumstances had not arisen to give the Plaintiff the right which he claims, of filing the bill; and, secondly, that it was not a bill on behalf of the Plaintiff and all other creditors.

Now, as regards the right of a Plaintiff to file a bill *quia timet*, the principle is clearly laid down by Lord *Redesdale* in these terms (7): "A Court of Equity will also prevent injury in some cases by interposing before any actual injury has been suffered; by a bill which has been sometimes called a bill *quia timet*, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus, a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety

(1) 1 Vern. 189.
(2) Mos. 318.
(3) 2 Bro. C. C. 579, 582.
(4) 3 Mer. 569.
(5) Ed. 1866, § 730.
(6) 6 Johnson (American) Ch. R. 308, 406.
(7) Pages 171, 172, 5th Ed.

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has been actually sued for it or not; and upon a covenant to save harmless a bill may be filed to relieve the covenantee under similar circumstances."

In this case the bond was an actual bond for indemnity, and the person to be indemnified was a surety on another bond. No doubt a bond of indemnity can be framed in such a way as to preclude the surety indemnified thereby from filing a bill, until he has actually paid something on behalf of his principal. But the terms of this bond are these:—[His Honour read the words.] And then the bill contains the following allegation:—[His Honour read the clause in the bill set out above, and continued:—] The meaning of that paragraph is clearly this, that the Plaintiff has been called upon to pay within the terms of the latter clause of the above instrument.

I think, therefore, that the exact state of circumstances has arisen which was contemplated by the framers of this bond to entitle the Plaintiff to file this bill.

The other objection was, that the bill is not expressed to have been filed on behalf of the Plaintiff and all other the creditors of the testator. But, in the first place, there is an express trust in the testator's will to pay this particular sum; secondly, the bill is not a bill for administration alone, it also asks for an indemnity; thirdly, I am bound to say that this is an objection which I should not in any case have allowed to prevail; because, whether the bill be or be not in terms filed on behalf of all the creditors, the decree is in the same form.

1 Ch D 692. 2 Ch D. 170

On these grounds, therefore, the demurrer must be overruled.

Solicitors for the Plaintiff: Messrs. *Wood, Street, & Hayter.*

Solicitor for the Defendants: Mr. *Richard Jones,* agent for Mr. *Walter Bailey, Winchester.*

LOW *v.* WARD.

V.-C. G.
1868
July 2.

Copyright—Injunction—First Publication—Portion of Work protected.

A., a citizen of the *United States*, published a work of which he was the author in the monthly parts, between January and December, 1867, of a magazine published in the *United States*. In October, 1867, *A.* went to reside in *Canada* for the purpose of acquiring a British copyright, and during such residence, when the work wanted six chapters for completion in the magazine, an edition of the whole was published in *London* under an agreement between *A.* and the Plaintiff, an English publisher.

A cheap reprint taken from the pages of the American magazine having been subsequently published in this country by the Defendant:—

Held, that the copyright was divisible and could be claimed for a portion of the book only, and accordingly the publication by Defendant of the last six chapters of the work was restrained by injunction.

MOTION for an injunction to restrain the Defendants from printing, publishing, and selling any copies of the book called the *Guardian Angel*, or any part thereof, other than and except copies thereof printed and published by Plaintiffs.

The *Guardian Angel* was written by Professor *Oliver Wendell Holmes*, of *Boston, United States*, and was brought out by him in a serial form in the numbers of the *Atlantic Monthly*, a magazine published at *Boston*, commencing in January, 1867, and terminating in December, 1867.

In March, 1867, Professor *Holmes* entered into an agreement with the Plaintiffs, a firm of publishers in *Ludgate Hill*, to take the necessary steps for acquiring a British copyright in the *Guardian Angel*, it being agreed that the copyright so acquired should be purchased by the Plaintiffs. In pursuance of this agreement Professor *Holmes*, in October, 1867, went to *Montreal*, in *Canada*, and was living there before and at the time of the publication of the *Guardian Angel* by Plaintiffs in *London*, which took place on the 25th of October. The work was published complete in two volumes, price 16*s.*, and on the same day a copy was delivered at the *British Museum* pursuant to 5 & 6 Vict. c. 45. At this date the story wanted six chapters for completion in the *Atlantic Monthly*.

The Defendants, who are also publishers, in *Paternoster Row*,

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brought out an edition of the *Guardian Angel* in one volume, price 2*s.*, on the 27th of April, 1868. They stated in their affidavit that they were ignorant of any claim to copyright for the work in this country, or of the publication of the Plaintiffs' edition, and that they had not seen a copy of Plaintiffs' edition when they (Defendants) brought out their edition, which was a reprint from the pages of the *Atlantic Monthly*, a magazine published at *Boston, United States*, in the numbers of which, from January to December, 1867, the *Guardian Angel* first appeared. Before bringing out their edition the Defendants had searched the register at *Stationers' Hall*, which then contained no entry of copyright of the work.

The entry, it appeared, was not made until the 3rd of June 1868, and was in the following form:—

Time of making the Entry.	Title of Book.	Name of the Publisher and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
June 3, 1868.	The *Guardian Angel.*	*Sampson Low* the elder, *Sampson Low* the younger, and *Edward Marston, Milton House, Ludgate Hill,* in the City of *London.*	Dr. *Oliver Wendell Holmes*, now of the City of *Boston, Mass., U. S.*, but at the date of publication residing at *Montreal* in *Canada.*	Oct. 25 1867.

On the same day the following entry of the assignment to them of the copyright was made by Plaintiffs:—

Date of Entry.	Title of Book.	Assigner of the Copyright.	Assignee of Copyright.
June 3, 1868.	The *Guardian Angel.*	Dr. *Oliver Wendell Holmes*, now of the City of *Boston, Mass., U. S.*, lately residing at *Montreal* in *Canada.*	*Sampson Low* the elder, *Sampson Low* the younger, and *Edward Marston*, of *Crown Buildings*, No. 188, *Fleet Street*, all in the City of *London.*

As soon as the Defendants' edition appeared the Plaintiffs wrote to complain, informing the Defendants that they had paid a large sum for the copyright, and calling upon them at once to stop the sale of their edition, and to account to them for the profits.

The Defendants, in reply, expressed their surprise at the asser-

tion of any claim for copyright in this country, adding that they had never seen the story in any other form than in the *Atlantic Monthly*.

Under these circumstances the bill was filed, and the Plaintiffs now moved for an injunction.

Mr. *Druce*, Q.C., and Mr. *Speed*, in support of the motion, relied upon *Low* v. *Routledge* (1), as shewing that an alien by residing temporarily in a British colony, and during the time of such residence publishing in *England* a book of which he was the author, would acquire a British copyright in the work.

Mr. *Kay*, Q.C., and Mr. *Westlake*, for the Defendants:—

The Plaintiffs are not entitled to copyright in the *Guardian Angel*, as the essential condition of a first publication in the *United Kingdom* of the entire work has not been complied with. Copyright is incapable of division, and cannot be claimed for a portion of a book only. As in the case of a patent, the monopoly is granted as a recompense for the benefit conferred upon the public by the giving to the world, in a complete form, a new and original work or invention; and unless that benefit has been received by the public, the privilege of the author or inventor cannot be sustained.

So in this case, as only the last six chapters of the *Guardian Angel* were first published in this country, the public has not received the requisite consideration for granting the author the right of exclusive publication. Even assuming that copyright can be claimed in these last six chapters, the interest is too trifling for protection by interlocutory injunction. Again, it is the peculiar feature of copyright that, though a monopoly, it disturbs no existing rights, and takes nothing from anyone, and neither in law, policy, nor morals, can a copyright which infringes this condition be maintained. But if *Holmes* by going to *Canada* could acquire a copyright in the first thirty chapters of a work already published by him in *America*, and consequently open to the Defendants, he would be depriving the Defendants of their existing rights to publish those thirty chapters, and, consequently, his claim to copyright must fail. In any case Professor *Holmes*, by his culpable omission

(1) Law Rep. 1 Ch. 42; Law Rep. 3 H. L. 100.

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to give any notice of his intention to acquire a British copyright by residence in *Canada*, and the Plaintiffs, by not getting their assignment registered until June, 1868, long after publication of the Defendants' edition, forfeited any right that they might otherwise have had to relief. On these grounds the motion must be refused.

SIR G. M. GIFFARD, V.C.:—

I have not the slightest doubt about this case. It is settled by *Low* v. *Routledge* (1) that an American who chooses to go across the frontier into *Canada*, and then publishes his work in the *United Kingdom*, acquires exactly the same rights as if he had been a British subject. The only ground on which this motion was resisted, was, that there could not be copyright as to a part of a work only. But there are numerous cases shewing that where the parts of a work can be separated, there may be a copyright in any distinct part of it. I may instance the cases of the last canto of Lord *Byron's Childe Harold*, *Croker's Notes to Boswell's Life of Johnson*, and of particular articles in Cyclopædias. There is no analogy in this respect between a patent and the case of copyright, as it matters not whether the copyright is for the entire work or for a part only. It was not, in my opinion, incumbent upon Professor *Holmes* to give notice of his intention to claim copyright in this country, and I see nothing to deprive Plaintiffs of their right to an injunction as to the last six chapters of the work.

MINUTE:—Injunction restraining Defendants until the hearing from printing or selling any copies containing the last six chapters of the work. Undertaking by Plaintiffs as to damages.

Solicitors: Messrs. *Taylor, Hoare, & Taylor;* Messrs. *Ashurst, Morris, & Co.*

(1) Law Rep. 1 Ch. 42; Law Rep. 3 H. L. 100.

ASTON *v.* WOOD.

V.-C. G.
1868
July 17.

Will—Charity—Legacy—Indefinite Trust—Failure of Bequest.

Testator bequeathed as follows:—"I give to the trustees of *Mount Zion Chapel*, where I attend, £3500, and appoint as trustees to the same *A.* and *G.*; and I direct that their receipt shall be a sufficient discharge to my executors; and the money to be appropriated according to statement appended." There was no statement appended:—

Held, that the gift was not intended to be for *A.* and *G.* beneficially; that the Court could not presume a charitable object in the bequest; and if not charitable, that the object was so indefinite that the gift must fail.

GEORGE WOOD, by his will, dated the 4th of February, 1868, appointed *James W. Aston* and *Albert Wood* his executors, and gave and devised all his real and personal property to his nephew, the said *Albert Wood*, subject to the payment of his debts and the legacies therein mentioned. He then bequeathed several legacies, and proceeded as follows:—

"I give to the trustees of *Mount Zion Chapel*, where I attend, £3500, and appoint as trustees to the same, *James W. Aston* (my nephew), and *Thomas Green, Dove's Hill*. And I direct that their receipt shall be a sufficient discharge to my said executors, and the money to be appropriated according to statement appended. Any property whatever, book-debts, shares, that above does not dispose of, I give to my nephew and residuary legatee, *Albert Wood*."

He died in April, 1868. There was no statement appended to the will, but a separate paper was found amongst the testator's effects, in his handwriting, containing notes of appropriation of seven different sums of £500 to as many charitable purposes. This paper was not signed, and had been refused to be admitted to probate by the Judge of the Court.

The bill was filed by *James Wood Aston* and *Thomas Green* against *Albert Wood*, praying for a declaration that the legacy of £3500 was a good and valid bequest, and that the Plaintiffs were entitled to receive the same as such trustees as aforesaid.

The Defendant demurred.

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It was stated in the course of the argument, and not denied, that neither of the Plaintiffs was a trustee of *Mount Zion Chapel.*

Mr. *Kay,* Q.C., and Mr. *Payne,* for the demurrer:—

There is nothing in the will to indicate any charitable purpose whatever; and the Court cannot look at the paper writing.

But even if the reference to an appended statement, which statement does not exist, leads to a suspicion of charitable intent, it is clear that an indefinite bequest for purposes of liberality, benevolence, or even private charity, does not amount to a gift for charitable uses: *Morice* v. *Bishop of Durham* (1); *Vezey* v. *Jamson* (2); *Williams* v. *Kershaw* (3).

[The VICE-CHANCELLOR referred to *Corporation of Gloucester* v. *Wood* (4).]

In any event the legacy must fail, so far as it is charged on realty; we say it fails altogether, and the Plaintiffs are not entitled.

Mr. *Druce,* Q.C., and Mr. *Speed,* for the bill:—

The mode in which this bequest is made is this:—The executors are to pay £3500 to *Aston* and *Green,* who are to give discharges, and pay the money over to the trustees of the chapel.

The purposes of the bequest are strictly religious purposes, which takes the case out of the observations in *Morice* v. *Bishop of Durham.* In the case of *Corporation of Gloucester* v. *Wood* there was a gift with a reference to a purpose said to have been expressed in a document which did not exist, and there was no possibility of identifying that purpose. In this case there can be no doubt whatever that the object of the gift is an existing body, capable of being identified. This must rather be considered a case of dedication by the testator to such religious uses as he shall afterwards appoint, where he dies without making such appointment: *Commissioners of Charitable Donations* v. *Sullivan* (5).

Supposing the Court to be against us on this point, we then

(1) 9 Ves. 399; 10 Ves. 522.
(2) 1 S. & S. 69.
(3) 5 L. J. (Ch.) 84; 5 Cl. & F. 111.
(4) 3 Hare, 131.
(5) 1 Dr. & W. 501.

say that this is a good gift, inasmuch as here there are clearly expressed donees, namely, the two Plaintiffs; and there is a clearly defined object, namely, this religious foundation of *Zion Chapel*. The gift cannot be affected by the non-existence of that which, if forthcoming, would have dealt with only the manner, not the object, of the gift.

If the testator did not mean these trustees to take absolutely, why should he have named one set of trustees, and then have mentioned another? A gift to three persons subject to such disposition as the testator might thereafter direct, was held to be a gift to them absolutely: *Fenton* v. *Hankins* (1).

Where there is an express gift to a person indicated, he takes beneficially, unless by other parts of the will the beneficial interest is clearly reduced to a trust; and the Court will never presume a trust.

[The following cases were also referred to: *Cook* v. *Fountain* (2); *Martin* v. *Douch* (3); *Baylis* v. *Attorney-General* (4); all of which are cited in the judgment in *Corporation of Gloucester* v. *Wood* (5).]

Mr. *Kay*, in reply:—

It is certainly singular that the testator should have made this gift to two sets of trustees. There can be no doubt that a trust was intended, though there is no indication of what it was.

The only faint suggestion of a trust, conveyed by the gift to the trustees of *Zion Chapel*, is thrown over by the other side. We quite agree there is no sign of an intention to benefit the trustees; they were to hold it for any purpose to which they chose to appropriate it. It is the same thing as if this were a gift to the trustees, *Aston* and *Green*, upon an altogether indefinite trust.

Sir G. M. Giffard, V.C.:—

I think this case comes very close to that of *Corporation of Gloucester* v. *Wood* (6), although it is not precisely the same.

As to the argument that these persons are to take beneficially, I cannot see by what possible ingenuity it can be contended that

(1) 9 W. R. 300.
(2) 3 Sw. 585, 591.
(3) 1 Ca. Ch. 198.
(4) 2 Atk. 239.
(5) 3 Hare, 136—148.
(6) Ibid. 131.

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such was the intention. That is not to be supposed for one moment. [His Honour read the terms of the bequest, and continued:—]

Now, if I cannot say that these persons are to take beneficially, neither can I possibly say for what purpose this sum was given to them. The £3500 is to be "appropriated according to statement appended." But as there is no statement appended, I cannot possibly tell or infer that the purpose thus intended to be referred to was charitable; and if it was not charitable, then the object of the bequest is clearly so indefinite that the gift must fail.

The order will be, the parties by consent taking this to be the hearing of the cause, declare that the legacy of £3500 was bequeathed upon an incomplete and indefinite trust, and therefore that the bequest fails, and the sum falls into the residue.

The costs will come out of the estate.

Solicitors: Messrs. *Benbow, Tucker, & Saltwell.*

V.-C. G. 1868 *July* 13.

COX *v.* BENNETT.

Will—Bequest of Leaseholds—Subsequent Purchase in Fee—Wills Act (1 *Vict. c.* 26, *s.* 23).

11 Eq 545.
12 Eq 294.
13 LT (OS) 360-1
363
14 LT (OS) 436

A Testator, by will, dated in 1865, bequeathed to trustees house property held by him on lease, and part of which he described as leasehold, upon trusts for the benefit of his wife for life, and, after her death, as she should appoint generally. He also made a residuary devise and bequest of realty and personalty. After the date of the will he purchased the reversion of the above leaseholds, and took a conveyance of the same to himself in fee:—

Held, that the freehold interest in the above property passed to the trustees in trust for the wife.

WILLIAM TOMLIN, made his will, dated the 3rd of April, 1865, and thereby, after appointing the Plaintiffs, *Edward Cox* and *George Legg*, and the Defendant, *John Bennett*, executors and trustees of the same, gave and bequeathed to *Cox, Legg*, and *Bennett*, their executors, administrators, and assigns, amongst other property, the following: "All that messuage and shop at the corner of *Tomlin Grove, Bow Road*, let on lease to Dr. *Gill*; and also all those thirty-one messuages or tenements known as

Nos. 1 to 31 inclusive in *Tomlin Grove, Bow Road*, aforesaid, and all in the parish of *Bromley Saint Leonards*, and held by me under two separate leases from the *Blackwall Railway Company*," upon trust to discharge the outgoings, and pay the surplus rents to his wife *Emma* for her life, for her sole and separate use, and after her decease to stand possessed of the same upon trust for and equally between all testator's children by his said wife *Emma;* and if he should leave no children by his said wife, then upon trust for such person or persons as his said wife should by her last will and testament direct or appoint. In default of appointment testator gave and bequeathed the same premises upon trust, as to one moiety upon the like trusts as were thereinafter declared, for the benefit of his daughter, *E. E. Bennett*, and her husband, children, and appointees; and as to the other moiety, upon the like trusts as were thereinafter declared, for the benefit of his daughter, *Laura Tomlin*, her husband, children, and appointees.

After various other devises and bequests, the testator proceeded as follows: "And as to all the rest, residue, and remainder of my real and personal estate not hereinbefore disposed of, and of which I may be seised, possessed, or entitled at the time of my decease, I give, devise, and bequeath the same, after payment thereout of all my debts, funeral and testamentary expenses, unto and equally between my said wife, *Emma Tomlin*, and my said daughters, *Esther Elizabeth Bennett* and *Laura Tomlin*, or such of them as shall be living at the time of my decease, their heirs, executors, administrators, or assigns, in equal shares and proportions as tenants in common for their own absolute use and benefit."

After the date and making of his will the testator purchased the reversion, and took a conveyance, dated the 5th of October, 1865, from the railway company to himself in fee simple of the property above described.

He died on the 18th of July, 1866, leaving his widow, the said *Emma Tomlin*, surviving him, by whom he never had any issue, and also leaving two daughters by a former marriage, the said *Esther Elizabeth*, wife of the said *John Bennett*, and the said *Laura Tomlin*, an infant, his only children.

This bill was filed on the 26th of July, 1867, by *Cox* and *Legg* against *Bennett* and *Esther Elizabeth* his wife, *Emma Tomlin*, *Laura*

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Tomlin, and *John Ernest Tomlin Bennett*, an infant son of Mr. and Mrs. *Bennett*, praying for administration, and declarations as to the rights of the parties.

The principal question raised was as to the effect of the purchase of the reversion upon the interests of the persons claiming under the specific gift of the premises as leasehold, and under the residuary gift (1).

Mr. *Druce*, Q.C., and Mr. *Marten*, for the Plaintiffs.

Mr. *Swanston*, Q.C., for Mr. and Mrs. *Bennett*:—

The bequest of the leasehold interest is adeemed by the subsequent purchase of the freehold. The law on this subject is not affected by the *Wills Act*.

The earliest authority is *Capel* v. *Girdler* (2), in which it was held, that where a testator has bequeathed a leasehold, if he afterwards purchases the freehold, the term is merged, and the legatee has no claim against the heir. In *Abney* v. *Miller* (3) Lord *Hardwicke* held that the renewal of a lease by a testator, after he had bequeathed it, was a revocation of the bequest.

Where a testator, by will, before the *Wills Act* (1 Vict. c. 26), devised property which he described as, and which was, leasehold; and after the *Wills Act*, by codicil, republished his will, and afterwards purchased the fee, thereby merging the leasehold, it was held that the leasehold was adeemed and the devise failed: *Emuss* v. *Smith* (4). *Miles* v. *Miles* (5) turned upon the peculiar language of the will.

Mr. *Wolstenholme*, for the Defendant, *John E. T. Bennett*, supported the same construction:—

The case is twofold. Was there a subject which at the date of

(1) The 23rd section of the *Wills Act*, 1 Vict. c. 26, is as follows:—

"And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

(2) 9 Ves. 509.

(3) 2 Atk. 593, 597.

(4) 2 De G. & Sm. 722.

(5) Law Rep. 1 Eq. 462. 35 Beav. 12 Jur. N.S. 116

the testator's death answered his description? It is submitted there was none. Then, if the specific subject of the gift be gone, how can the freehold be held to pass under the self-same words?

The *Wills Act* says, that every will shall be construed (not for every purpose, but only) "with reference to the real and personal estate comprised in it," to speak from the death of the testator. How can it be said that a freehold interest which did not exist at the time of making the will, is "comprised in it?"

This is purely a specific gift of a specific thing, in existence at the date of the will and not in existence at the death of the testator: *In re Gibson* (1).

The Vice-Chancellor:—If this will had been made before the *Wills Act*, and, before the *Wills Act*, had been republished after the purchase, would it not have kept the term alive?

Mr. *Swanston*:—Lord *Hardwicke* expressly said he thought not: *Abney* v. *Miller* (2).

Mr. *W. M. James*, Q.C., for the widow, referred to *Struthers* v. *Struthers* (3).

Mr. *G. Murray*, for the Defendant, *Laura Tomlin*.

Mr. *Swanston*, in reply:—

Struthers v. *Struthers* is not reported in the authorized series; it was not argued by any leading counsel; and *Emuss* v. *Smith* (4) does not appear to have been cited.

Sir G. M. Giffard, V.C.:—

I think this is one of those cases which it was intended that the *Wills Act* should operate upon.

The clause in the statute says that the will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death; and there is nothing in the will to confine its operation to the interest which the testator had at the date of the will. The mere method which the testator adopts

(1) Law Rep. 2 Eq. 669, 672
(2) 2 Atk. 599.
(3) 5 W. R. 809.
(4) 2 De G. & Sm. 722.

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of describing his property is not equivalent to saying "I give the leasehold interest" and nothing else. There is, I think, in this description abundant to carry the freehold interest in the property.

There will be a declaration that the freehold estate passed under the specific devise, and the usual decree for the administration of the real and personal estate.

Solicitors for the Plaintiffs: Messrs. *Waltons & Bubb.*

Solicitors for the Defendants: Messrs. *Barnes & Bernard;* Messrs. *Cattarns & Jehu.*

V.-C. G. 1868 June 12, 26.

In re PFLEGER.

Lands Clauses Act, 1845, s. 74—*Application of Purchase-money—Leaseholds—Insufficiency of Income of Investment—Tenant for Life and Remainderman.*

14 LTO 33-6

The income of the investment of purchase-money of leaseholds taken under the *Lands Clauses Act* being insufficient to give a tenant for life of the lease the same benefit as she would have had if the lease had continued in existence, the Court directed a Government annuity equal to the net income from the leaseholds to be purchased, or if the fund were insufficient for that purpose, then that the dividends be paid to the Petitioner for life, and the principal half-yearly divided by the number of years unexpired of the term, and half of the quotient part of the stock to be sold, and the amount paid to the Petitioner during her life in addition to the dividends.

Petition.

Christopher Pfleger, being lessee of a house, No. 22, *Plough Street, Whitechapel*, for a term of sixty years from Midsummer, 1839, at a yearly rent of £15, by his will bequeathed all his estate and effects upon trust for the Petitioner *Sarah*, then the wife and now the widow of *Christopher Pfleger* the younger, for her life, with remainder to her children.

Christopher Pfleger the elder died on the 1st of October, 1847, and *Christopher Pfleger* the younger died in November, 1857, leaving five children, of whom the youngest was now an infant.

The house, No. 22, *Plough Street*, having been taken by the Metropolitan Board of Works, they had paid, upon the valuation of two surveyors, £500 for the leasehold interest.

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The Petition stated the above facts, that the rents of the house before it was taken amounted, after payment of all outgoings, to the sum of from £25 to £26, whilst the dividends of the £500, if invested in consols, would amount to between £15 and £16 only, and that the Plaintiff was a poor woman, and prayed that the sum of £500 might be carried over to the account of the settled estate of *Christopher Pfleger*, and invested and paid in such manner as would give to her the same benefit therefrom as she might have had from the lease of the premises so taken by the Board of Works.

Mr. *W. Pearson*, for the Petitioner:—

The prayer follows the language of the Act, sect. 73.

The authorities are, first, *Ex parte Wilkinson* (1), where the income of the purchase-money being insufficient to pay an annuity charged on the leaseholds, Vice-Chancellor *Knight Bruce* held that portions of the *corpus* ought to be sold from time to time to satisfy the growing payments. The same principle was followed by the Master of the Rolls in *Jeffreys* v. *Conner* (2). In *In re Money's Trusts* (3) Vice-Chancellor *Kindersley* held that the purchase-money must be divided according to the number of years of the lease unexpired, and that the representatives of the tenant for life were entitled to a portion in respect of the years during which the tenant for life lived; the rest to the remainderman. But this decision appears to have been disapproved by the same learned Judge, who, in *In re Chamberlain* (4), is said to have thought it best to refer it to an actuary to determine what sums might fairly be sold out at the end of each year for the tenant for life. There the lease had twenty-three years to run.

In *Littlewood* v. *Pattison* (5), however, Vice-Chancellor *Wood* directed that the invested purchase-money, or so much as from time to time remained, and the interest thereon, should—in each year—be divided by the number of years which would have remained unexpired of the lease if it had still existed; and the amount of the quotient paid yearly to the tenant for life; and

(1) 3 De G. & Sm. 633.
(2) 28 Beav. 328.
(3) 2 Dr. & Sm. 94.
(4) *Morgan's* Chancery Acts, p. 41, n. 4th Ed.
(5) 10 Jur. (N.S.) 873.

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this may be the ordinary rule of the Court, notwithstanding what was said in *In re Birch* (1).

But in the present case, the term being long, the quotient of £516 (the purchase-money and interest), divided by thirty-one, will not give more than £17 a-year; and the rule does not meet the necessity of the case.

Mr. *Cracknall*, for the remaindermen.

The VICE-CHANCELLOR made an order as follows:

"If the £500 will purchase an annuity of £26 for thirty-one years certain, then the money to be laid out accordingly, and the annuity paid to the Petitioner during her life; but if it will not, then order that the £500 be carried over and invested as prayed; and that the dividends on the consols for the time being, be paid to the Petitioner during her life, and that the consols be half-yearly divided by the number of years the lease would have had to run, at the time of such division, if it had been still in existence; and that half of the quotient part of the stock be sold, and the amount paid to the Petitioner during her life in addition to the dividends: Costs according to the Act."

June 26. The matter was mentioned again to-day.

Mr. *Pearson* said it had been found that a Government annuity could not be purchased in the name of the Accountant-General, that the Petitioner was in her sixty-first year, and that the amount to be transferred to the Commissioners for the Reduction of the National Debt, for purchase of the proposed annuity, was £341 19*s.* £3 per Cent. Consols.

The VICE-CHANCELLOR made the following order:

Direct that out of the fund a Government annuity of £26 for the life of the Petitioner be purchased in the name of the Petitioner, and that the residue of the fund be invested, and the interest accumulated during the Petitioner's life with liberty to apply on her death.

Solicitor: Mr. *H. Tayler.*

(1) 10 Jur. (N.S.) 673.

In re DARE VALLEY RAILWAY COMPANY.

V.-C. G.
1868
July 9.

Arbitration—Referring back the Award—Mistake—Evidence of Arbitrator.

The Court will admit evidence of an arbitrator in explanation of his award; and when it appears from such evidence that there has been a mistake on his part, either as to the subject-matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside or referred back again to the arbitrator.

THIS was a motion on behalf of Messrs. *Rhys & Richards* that the award made in the matter of the arbitration between the *Dare Valley Railway Company* and themselves by *John Clutton*, the umpire appointed in the said matter, might be set aside.

The claimants, Messrs. *Rhys & Richards*, were lessees of the *Merthyr and Dare Colliery*, in the parish of *Aberdare*, for a term of fifty-one years from the 14th of July, 1860; and were also lessees of the surface lands at a rent of £55 per annum for a term of eighteen years from July, 1860, subject to a proviso for the cesser of such term as to any portions of such surface which might be required for the formation of a railway connecting their colliery with the *Taff Vale Railway*, which the lessor covenanted to make.

In 1863 an Act was passed (*Dare Valley Railway Act*, 1863) for the formation of a railway along the *Dare Valley*, in order to open up the district and bring its mineral produce to *Cardiff*. This Act was promoted by Mr. *Williams*, the lessor to the present claimants, and it was supported by Mr. *Rhys*, who gave evidence in favour of it before the committee.

On the 1st of August, 1864, the company served Messrs. *Rhys & Richards* with notice to treat for a portion of the surface land belonging to the colliery, consisting of 2A. 0R. 26P. The land in question was severed from the pits by the *Vale of Neath Railway*, which was divided from the river *Dare* by a steep and precipitous slope of mountain land, along which, parallel with the *Vale of Neath Line*, the *Dare Valley Line* was constructed. The claimants entered into negotiations with the company for the construction of certain

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accommodation works which were executed by the company. On the 3rd of January, 1867, Messrs. *Rhys & Richards* served the company with notice that they desired to have settled by arbitration, in the manner provided by the *Lands Clauses Act*, incorporated with the *Dare Valley Railway Act*, the amount of compensation to be paid to them by the company "for the interest belonging to us, or which we are enabled or entitled to sell and convey, or release and assign, in the lands and hereditaments mentioned or referred to, and required to be purchased by you," by the notice of the 1st of August, 1864, "and as and for compensation for the damage sustained or to be sustained by us by reason of the execution of the works authorized by the said Act. The nature of our interest in the said lands and hereditaments is as follows:—We are lessees for the term of fifty-one years, wanting one day, computing from the 14th of July, 1860, of the iron in or under the said lands and hereditaments, and other lands and premises adjoining and near thereto, with powers to enter into and upon the surface at all times during the term for the purpose of winning, working, depositing, and carrying away the said iron, with power to tip on the surface, soil, earth, rubbish, or other material, and with divers other powers; and we are lessees of the said lands and hereditaments mentioned or referred to in the said notice, and the said other lands adjoining and near thereto (reserving the said minerals), for a term of eighteen years less one day from the 2nd of February, 1860. And we claim for the value of the lands and hereditaments, and for the damage sustained and to be sustained by us by reason of the execution of the works authorized by the said Act, the sum of £3500."

In order to save the expense of a special inquiry, the company offered £250; but this offer was not accepted, and arbitrators were appointed on either side. The arbitrators having refused to appoint an umpire, *Clutton* was on the 12th of April appointed umpire by the Board of Trade: (*Lands Clauses Act*, 1845, s. 28.)

On the 19th and 20th of November the umpire was attended by counsel on both sides. On behalf of the company it was contended that the claimants were not entitled to any compensation whatever, as their lessor had covenanted with them to apply for an

Act of Parliament authorizing the construction of a railway connecting the colliery with the *Taff Vale Railway*, and that, as they had supported the *Dare Valley Railway Act*, 1863, they must be taken to have acquiesced in the interference by the company with the tipping ground, and to have accepted the company's line of railway in lieu of that which their lessor had covenanted to make.

Evidence was also adduced to the effect that the land in question had never been used for tipping purposes since the construction (eighteen years before) of the *Vale of Neath Line*, and that from its very steep incline to the river it was most inconvenient, and, moreover, could only be used by crossing the *Vale of Neath Line*.

The claimants, on the other hand, adduced evidence for the purpose of shewing the amount of damage that would result from the loss of this tipping ground, which it had been intended, after constructing a bridge over the *Vale of Neath Line*, at once to use, and they also contended that the umpire had no jurisdiction to try or determine the question whether the claimants were or were not entitled to compensation, the only matter referred to him being the amount of compensation properly payable.

By his award, dated the 29th of January, 1866, the umpire awarded the sum of £50 as the amount to be paid by the said *Dare Valley Railway Company* to the claimants for the purchase of their estate and interest in the lands and hereditaments specified in the notice of the 1st day of August, 1864, and for compensation for the damage which had been or might be sustained by them by reason of the execution of the works authorized by the said *Dare Valley Railway Act*, 1863.

The submission to arbitration having been made a rule of Court by the claimants, they served notice of motion, dated the 25th of April, 1868, that the award be set aside, and had issued a subpœna for the attendance in Court of Mr. *Clutton* to be examined when the motion came on. The motion was opened on the 25th of June. Mr. *Clutton*, on being called, objected to give evidence, but stated that he had drawn up a paper containing the reasons for his award in case he should be called upon to give them.

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Mr. *W. M. James*, Q.C., in support of the motion, proposed to put in as evidence the paper of reasons prepared by the arbitrator, and cited *Mills* v. *Bowyers' Company* (1); *Duke of Buccleuch* v. *Metropolitan Board of Works* (before the Court of Exchequer, May 25, 1868). 3 H. & C. 174; 13 L. T. 306.

Mr. *H. Matthews*, Q.C., on behalf of the railway company, objected to the reception of these reasons, contending that it was not competent for the Court, without the consent of the umpire, to extract from him the grounds on which he had made his award: *In re Brown and Croydon Canal Company* (2); *Morgan* v. *Mather* (3); *Russell* on Arbitration (4).

[The VICE-CHANCELLOR, without then deciding the question as to the reception in evidence of these reasons, directed them to be read *de bene esse*.]

The paper was as follows:—

"1. That, in the lease of the collieries to claimants, dated the 4th of July, 1860, the lessor covenanted with them to obtain, before the 1st of September, 1861, such lands as should be requisite for the construction of a railway to connect the collieries demised with the *Taff Vale Railway;* and if he should be unable to obtain such lands by private arrangement before that day, that he should, in the next session, apply for an Act authorizing the construction of such railway, and the compulsory taking of the lands needful for it; and that by such lease the lessor also covenanted with the claimants that he would, within twelve calendar months after obtaining such lands by private arrangement, or after the passing of such Act, construct and finish a railway between some part of the surface lands above the collieries and the *Taff Vale Railway;* and that in the lease of such surface lands of the same date, and between the same parties, it was provided that, in the event of any such portion of surface lands (of which the land forming the subject of my award was part) being required to be taken for the railway comprised in the said covenant, the demise thereby made should be deemed at an end as to the lands so taken, sub-

(1) 3 K. & J. 66.
(2) 9 Ad. & E. 522.
(3) 2 Ves. 15.
(4) 3rd Ed. pp. 302, *et seq.*

ject to a reduction of rent as therein mentioned. The railway in question was the railway covenanted to be made by the said lessor, and the lands taken from the claimants for the same, and comprised in my award, had ceased to form part of the demise by virtue of the said provision—the remedy of the claimants being a reduction of rent by virtue of such provision.

"That, between the pit mouths of the collieries and the land forming the subject of my award, the *Vale of Neath Railway* had been some years constructed, over which it would have been necessary to construct a bridge to enable the claimants to deposit spoil from the collieries upon such land; and that the claimants had power to construct such bridge, but had never taken any steps to construct the same, or to use such land for tip ground, although they had been for a considerable period cramped for room for tipping; and in 1862 they were raising their spoils by engine-power, when they might have constructed such bridge to carry the spoil across the *Vale of Neath Line* to the land forming the subject of my award.

"The claimants, in 1862, opposed a railway projected by the lessor which ran near to the said collieries, on the ground that such railway did not connect the collieries with the *Taff Vale Railway*, and was not therefore such a railway as was intended by the said covenant and provision, and supported the Act obtained in 1863 for the formation of the railway in question, as being within the terms of the said covenant and provision.

"The tip ground and railway could not exist together.

"The notice by the railway company to take the land comprised in my said award was served in August, 1864, and the claim was not made until 1867, after difference had arisen between the claimants and the railway company. Therefore no substantial damage has been done to the claimants by the railway."

Mr. *W. M. James*, Q.C., and Mr. *Freeling*, in support of the motion:—

The award must be set aside, as it is clear from his reasons that there has been miscarriage on the part of the umpire in disregarding the order of reference, under which he had no jurisdiction to inquire into the legal rights of the claimants, or how far their

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position was affected by the covenants contained in their lease, but was bound simply to assess the amount of compensation payable to them for the damage occasioned by the company, which he has omitted to do: *Reg.* v. *Metropolitan Railway Company* (1); *In re Hall & Hinds* (2); *In re Robson & Railston* (3); *Hutchinson* v. *Shepperton* (4). Although the Courts have declined to interfere with the arbitrator's discretion, or set aside an award good on the face of it, on the ground of alleged mistake, the admission of mistake by the arbitrator himself is sufficient to induce the Court to act: *Phillips* v. *Evans* (5); *Lockwood* v. *Smith* (6); *Walton* v. *Swanage Pier Company* (7); *Mills* v. *Bowyers' Company* (8); *Russell* on Arbitration (9).

Mr. *H. Matthews*, Q.C., and Mr. *Leonard Field*, opposed the motion:—

The Court will not set aside or refer back an award which is good on the face of it, and where no corrupt motive can be imputed to the arbitrator, who is the sole and final judge of law and fact, and by whose decision the parties who have chosen him as their judge are bound to abide: *Fuller* v. *Fenwick* (10); *Hodgkinson* v. *Fernie* (11). Assuming that the Court will look at the reasons given by the arbitrator, there is no sufficient ground for setting aside or referring back the award. The reasons given may be technically wrong, but, when read by the light of the facts brought before the umpire, they are substantially right. No doubt the claimants had this right of tipping upon the land taken by the railway company, but the right was practically useless, was never exercised, and, having regard to the claimants' own stipulation with their lessor (inconsistent with this right of tipping now asserted) that a railway should be made in this particular locality, was never intended to be exercised. The claim, when tested by the surrounding circumstances, being a merely fictitious one, the

(1) 32 L. J. (Q. B.) 367.
(2) 2 Man. & G. 847.
(3) 1 B. & Ad. 723.
(4) 13 Q. B. 955.
(5) 12 M. & W. 309.
(6) 10 W. R. 628.
(7) Ibid. 629.
(8) 3 K. & J. 66.
(9) Part ii. ch. v. s. 8.
(10) 3 C. B. 705.
(11) 27 L. J. (C. P.) 66.

umpire was fully justified in awarding nominal compensation only.

SIR G. M. GIFFARD, V.C.:—

I propose to refer the matter back to the same arbitrator, but there should be an undertaking by Mr. *James'* clients not to claim any damages for the surface.

[Mr. *W. M. James*, Q.C., undertook not to claim more than 5*s.* for surface damage.]

My reasons are these:—There is no doubt that this sort of jurisdiction is sometimes somewhat difficult to deal with, but I think one may be quite safe in laying down the following principles. Of course no award, where there is anything like fraud, can stand for a moment, nor could one by possibility shut out evidence on fraud; but we have nothing whatever to do with that subject in the present case. I can see no reason why the arbitrator should not be just as well called as a witness as anybody else, provided the points as to which he is called as a witness are proper points upon which to examine him. If there is mistake in point of subject-matter—that is, if a particular thing is referred to an arbitrator, and he has mistaken the subject-matter on which he ought to make his award, or if there is a mistake in point of legal principle going directly to the basis on which the award is founded—these are subjects on which he ought to be examined, and also grounds for setting aside his award. In this case there has been, I think, a mistake on both those grounds. First of all there has been a mistake as to subject-matter. What the arbitrator had to do was this: he had to take the notice in his hand, and to take from that notice what the rights of the claimants were—I mean the rights in point of title to the property, and term in the property, and so forth; and, taking the notice in his hand, what he ought to have done was to take into consideration the surrounding circumstances, such as the situation of the land, the slope, the intervention of the *Taff Vale Railway*, and, if you like, such a circumstance as this—that the damage had been done in 1864, and that there had been no claim made until 1867. All those were legitimate circumstances; but when he took into

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consideration, as he obviously has according to his first reason, the covenant on the part of the lessor to construct a railway, and the right on the part of the lessor to take back to himself whatever surface any other railway might take, he mistook, I think, the subject-matter of the reference to him. What was referred to him was to ascertain what damage had been sustained by these parties claiming to have an absolute right in the term, and he had no business to assess anything except the damage which they might sustain as having an absolute right in this term. Now the subject-matter upon which he awarded was not an absolute right in this term, but it was a right subject to a lessor's right to take away a portion of that land. In my judgment that was not referred to him at all, and, that being so, there was a mistake in point of the subject-matter of the reference.

I think, also, there was a mistake in point of legal principle when the umpire took upon himself to say that he was to consider that the claimants had opposed some other railway, and wished this railway to come upon their land. I do not think that was referred to him, or that it was a matter for his consideration. In many ways, for instance, it might be an excessively good thing for them to have a railway come upon their land; but that was not the question before him. The question before him was this, and nothing else: What mischief has happened to you, the lessees, from having a railway come through that property of which you are lessees, say for fifty years, cutting one part of that property from the other? It was the right of the parties who made that claim, to have the award on that, in order that they might bring their action upon that award, and have it determined in that action whether the lessor's right did or did not interfere with their right to receive the damages so awarded to them. That is my clear opinion in this case. I can fancy many cases in which there would be extreme difficulty and delicacy, but I do not think that is the case here; for the one ground alone would have been sufficient—namely, a mistake in the subject-matter referred to the arbitrator on which he has awarded. He was to award in point of fact on an absolute term vested in these parties. He has not awarded on that, but upon a term subject to determination by the lessor, which was a matter he ought not to have taken into his

consideration. At the same time, I do not in the slightest degree hesitate to refer back the whole matter to Mr. *Clutton* again. V.-C. G. 1868 *In re* DARE VALLEY RAILWAY CO.

Solicitors: Messrs. *Vizard, Crowder, Anstie, & Young*, for Mr. *David Randall, Neath;* Messrs. *Field, Roscoe & Co.*, for Mr. *Benjamin Matthews, Cardiff.*

HOPKINS *v.* WORCESTER AND BIRMINGHAM CANAL PROPRIETORS.

V.-C. G. 1868 June 9.

Canal Company—Debenture Holder—Right to recover Principal—Receiver.

By a canal company's Act the proprietors were empowered to borrow on the credit of the undertaking, and to assign the property and rates as a security for the sum borrowed, in a form which fixed no date for the repayment of the principal. It was declared that there should be no priority by reason of date or otherwise amongst the debenture holders; and that every holder of a debenture might transfer the same according to a form specified. It was further provided, that the interest due on the moneys so borrowed should be paid in preference to any dividend to shareholders. By a subsequent Act further borrowing powers were given to the company, and it was provided that all persons to whom mortgages should be made under that Act should be entitled to the company's rates and property in proportion to the "interest" of the sums for which such mortgages should be executed:—

Held, that the holder of a debenture of the specified form was entitled, upon non-payment by the company, after six months' notice, of the principal money secured by the debenture, to a receiver; although there was not, and never had been, any arrear of interest; and although some of the debenture holders refused, and others might not be able, to consent to be paid off.

THIS bill was filed by *Emma Handasyde Hopkins*, spinster, on behalf of herself and all other the mortgagees of the *Company of Proprietors of the Worcester and Birmingham Canal Navigation*, other than such of them as did not desire to have their mortgages paid off, against the company and *Edward Bembridge*.

The bill stated, that by the *Worcester and Birmingham Canal Act*, 1791 (31 Geo. 3, c. 59), it was enacted that the several persons therein named, and others, should be united into a company for the better carrying on and maintaining a navigable canal, according to the rules therein expressed, and should be a body corporate with

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the above name, and by that name might sue and be sued, and should have power to hold lands in mortmain; also that the Company of Proprietors were thereby authorized to make a canal from *Birmingham* to *Worcester*. By the 32nd and 33rd sections the company were empowered to raise amongst themselves a sum for the completion of the work not exceeding £180,000, in 1800 shares of £100 each. By the 34th section the company were empowered, if that sum should be insufficient, to raise £70,000 more by calls on the proprietors.

By the 35th section it was enacted, that in case the proprietors should be desirous of raising the said sum of £70,000 by mortgage of the undertaking, it should be lawful for the company, by an order of general assembly, "to borrow and take up at interest the said sum of £70,000, or any part thereof, upon the credit of the said undertaking," as to them should seem fit and convenient; and the company were empowered to assign "the property of the said navigation and the rates granted by this Act to the said company of proprietors, or any part thereof, as a security for the money so to be borrowed, with interest for the same," in the following form:—

"By virtue of an Act of Parliament made in the 31st year of the reign of his Majesty King *George* III., intituled [insert the title of the Act], we, the company of proprietors of the said navigation, in consideration of the sum of to us paid by *A. B.*, do hereby bargain, sell, and transfer unto the said *A. B.*, his executors, administrators, and assigns, the said navigation and all and singular the rates granted to us by the said Act, and all our right and interest therein respectively, to hold unto the said *A. B.*, his executors, administrators, and assigns, until the said sum of , together with interest for the same after the rate of for £100 by the year, shall be fully paid and satisfied. Given under our seal this day of ."

It was further enacted that all persons to whom such assignments should be made should be "equally entitled, one with the other, to the rates and premises thereby assigned, in proportion to the sums by them respectively advanced and paid as aforesaid, without any priority by reason of the date or otherwise;" and that every person to whom any such assignments should be made, or who should

be entitled to the money due thereon, should and might transfer his right and interest to any person or persons whomsoever in the following form:—

"I, *A. B.*, do hereby transfer a certain mortgage made by the *Company of Proprietors of the Worcester and Birmingham Canal Navigation* to , bearing date the day of , for securing the sum of , and interest, and all my right and property therein, to *C. D.*, his executors, administrators, and assigns. Dated this day of ."

By the 36th section it was further enacted that "the interest of the money which shall be borrowed as aforesaid shall be paid half-yearly to the several persons entitled thereto in preference to any interest or dividends due and payable by virtue of this Act to the proprietors, and shall be fully discharged or provided for before the yearly or other interest, or dividends, due to the said proprietors shall be paid."

By another Act, called the *Worcester and Birmingham Canal Amendment Act*, 1798, the company were empowered to borrow from any person or persons, upon the credit of the rates, the sum of £149,000 and upwards, or to raise any such money by the granting of annuities; and they were authorized to make over their interest and property in the canal and rates as a security for any sum so to be borrowed, with interest, by deed of mortgage, "in like manner and form" as mentioned in the former Act.

By a subsequent Act passed in 1808 (48 Geo. 3, c. 49), which recited the former Acts, it was provided (sect. 3) that all persons to whom mortgages had been made for securing a particular sum of £4000, and all persons to whom mortgages should be made under the powers of that Act, should be equally entitled to the rates and property thereby assigned, "in proportion to the interest" of the sums for which such mortgages should be executed, without any preference by reason of priority of date, or otherwise; and in a more recent Act a similar provision was inserted.

Under these and other Acts, or some of them, the company had borrowed sums amounting together to £102,083.

On the 4th of April, 1860, the Plaintiff advanced to the company a sum of £445, which, together with interest at 5 per cent.,

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was secured to her by an instrument in the form prescribed by the Act, and set out above, dated the 4th of April, 1860.

On the 31st of July, 1867, the Plaintiff, being desirous of realizing her principal, served a notice on the company, requiring them to pay to her, on the expiration of six calendar months, the principal of £445 and interest. The company did not pay, and a correspondence ensued between the solicitors, in the course of which the company's solicitors wrote to the effect that the company had been advised that the mortgages on their tolls did not confer any right on the mortgagees to enforce the repayment of the principal, but only to receive the interest, and to transfer the mortgage to a purchaser in the mode provided by the Act.

It was admitted that the interest on the mortgages had always been regularly paid, and was not in arrear.

This bill was filed on the 15th of April, 1868, praying:—

1. An account of what was due to the Plaintiff for principal and interest upon her mortgage, and also what was due for principal and interest to all other mortgagees, and of all the rates granted to the company by the said Acts, or any of them, and comprised in, and mortgaged by, the said mortgage of the 4th day of April, 1860, and the said other mortgages referred to; and that the Defendants, the *Canal Company*, might be decreed to pay to the Plaintiff and such other mortgagees as aforesaid, or to such of them as should desire to receive the same, the respective amounts which should be found due to them upon taking such account.

2. A declaration that the Plaintiff and all the other mortgagees were entitled to a primary charge upon the said navigation and rates, for the repayment to the Plaintiff and other mortgagees desiring to be repaid, of the principal and interest due to them respectively upon their securities, and to have such rates applied in or towards payment, and that the said rates might be applied accordingly.

3. That the Defendants, the company, might be restrained from applying the income arising from the said navigation or rates in payment of any dividends, or otherwise than in discharge of the principal moneys and interest then due to the Plaintiff and such other mortgagees requiring payment of their principal moneys.

4. That a receiver might be appointed of the income arising from the said navigation and rates, and comprised in the said mortgage deed of the 4th day of April, 1860, and the mortgage deeds of such other mortgagees as aforesaid; and that the income might, in the first place, be from time to time applied by the receiver in payment of the interest of the moneys borrowed on mortgage, and the surplus in repayment, rateably, to the Plaintiff, and to such other mortgagees as aforesaid who required payment of their said principal moneys, in proportion to the amount of the sums for which the several mortgages were executed, of the principal moneys found to be due to them respectively, and secured under such several mortgages as aforesaid.

The Defendant *Bembridge*, one of the mortgagees, was made a party by amendment, to represent the rights of those mortgagees who did not desire to be paid off.

Mr. *Druce*, Q.C., and Mr. *Bristowe*, for the Plaintiff:—

The statute gives us a security on all the rates and property of the company until our principal as well as our interest is paid. We are therefore entitled to a receiver over the whole. We admit that we have no priority, and it may possibly be requisite that the receipts in proportion to that part of the rates which would be attributable to those mortgagees who do not desire to be paid off, should be secured for their benefit; but with that we are not concerned.

After the decision in *Pontet* v. *Basingstoke Canal Company* (1), it is extremely doubtful whether the Plaintiff can recover at law; which affords a strong argument for holding that she has a remedy in equity. It is not sufficient to say that a form of transfer is prescribed, for it does not follow that a person is always to be found ready to become a transferee; and the contention raised by the Defendants makes persons unwilling to take the security.

The above case is an authority to shew that the provision as to mortgagees taking *pari passu* only strikes at an action on the covenant against the company, on the ground that if a mortgagee obtained judgment, and issued execution, he would gain a priority.

(1) 3 Bing. N. C. 433; 4 Scott, 182.

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In *Potts* v. *Warwick and Birmingham Canal Company* (1), which was a suit by one of the mortgagees for a receiver (which he obtained), a judgment creditor, before the hearing, petitioned the Court in the cause to be at liberty to sue out and execute a *fi. fa.* and *elegit*. He was allowed to execute the *fi. fa.*, but was permitted to take under the *elegit* only such right in the lands as the company had, namely, a right to the land subject to the mortgages, to the right of user of the canal by the public, and to the powers of management of the company. That case established the Plaintiff's right to a receiver, and shews, further, that an execution creditor by *elegit*, cannot interfere with the prior right and function of the receiver. It may, however, be said, that *Gardner* v. *London, Chatham, and Dover Railway Company* (2), shews the latter part of the decision to have gone too far. The right to a receiver, again, was established in *Ames* v. *Trustees of Birkenhead Docks* (3); and in *De Winton* v. *Mayor, &c., of Brecon* (4), a case which governs the present. It is wholly immaterial that in these authorities it was the interest that was in arrear; for the plain meaning of the Act is that the rates and tolls are to be held until the principal and interest both are paid. The 35th section gives the company power to assign "the property of the navigation and the rates" as a security for the money borrowed.

It is inequitable that shareholders in a concern carried on by borrowed money, should tell the persons by whose funds they are carrying on the concern, that they (the shareholders) are not their debtors at all.

[*Pardoe* v. *Price* (5) was also referred to.]

Mr. *Kay*, Q.C., and Mr. *Speed*, for the company:—

Although the language of legislation with regard to these companies has been generally uniform, and in many instances identical, there is no case to be found where this form of relief has been granted in the case of a canal company. The statutory form of mortgage does not fix any time for the repayment of the principal; and at the same time the statute does (sect. 36) make pro-

(1) Kay, 142.
(2) Law Rep. 2 Ch. 201.
(3) 20 Beav. 332.
(4) 26 Ibid. 533.
(5) 16 M. & W. 451.

vision for the payment of interest; and even contemplates the possibility of a failure to pay interest; the object of these provisions plainly being, to induce the public to come in and take shares.

What then has been the course of authority? In *Pontet* v. *Basingstoke Canal Company* (1), there being interest in arrear, an action was brought upon a mortgage similar to this, and Chief Justice *Tindal* said, "Nobody ever heard of an action against the proprietors for the interest of the money advanced on the credit of the undertaking. It would be the ruin of undertakings of this sort, if the proprietors were to be personally liable." It follows from this, that a mortgagee under a contract of this kind, cannot bring an action upon the covenant, or any other form of action, either in respect of his interest or his principal. A loan to a canal company, therefore, differs from a loan to an individual, inasmuch as it creates no debt. "Their remedy," says the Chief Justice, "would be by entering on the property of the company." The result of the decision is, that in this case there is no legal debt.

The cases which have been referred to in equity, were all cases where there was an arrear of interest; and the distinction is obvious. The Act provides for the payment of interest at definite periods; but not for the payment of the principal. One of the first cases is *Mellish* v. *Brooks* (2), a case of turnpike tolls. That was followed by *Lord Crewe* v. *Edleston* (3), and *Gardner* v. *London, Chatham, and Dover Railway Company* (4).

According to the Plaintiff's contention, the day after one of these mortgages was made (for six months is quite as unauthorized and arbitrary a period for notice as six days or two days) the mortgagee might give notice, requiring repayment, and then if the money was not repaid, he might get a receiver; and from that moment not a single dividend could be paid till the whole mortgage debt was paid off. But if that had been the intention of the Legislature, the Act would have contained some intimation of it. All we find is the 36th section. Besides, no one in his senses would have invested in such a company, if he had known that the

(1) 8 Bing. N. C. 433; 4 Scott, 182.
(2) 3 Beav. 22.
(3) 1 De G. & J. 93.
(4) Law Rep. 2 Ch. 201.

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surplus income was liable at any moment to be arrested by a mortgage creditor who happened to want his principal; and then that not one shilling of dividend could be obtained till all the mortgage debt was paid off. To hold such a doctrine upon the construction of the Act would be ruin to the company.

The fact is, the intention was to create a debenture stock, and accordingly whilst there are provisions for transfer, there is no provision for repayment. The holder was to be in the same position as to rights and remedies as a holder of consols. Otherwise it would be in the power of one man, whatever might be his motives, to stop the whole working of the canal and break up the company.

Lastly, the granting of a receiver is part of the discretionary jurisdiction of the Court; and the only ground for its exercise here is, that this security, being of the nature of a mortgage, involves a right of repayment, although the Act be silent on the subject. But that is a very extravagant proposition, seeing that the mortgage itself does not contain any statement about a time for repayment. In *Potts* v. *Warwick and Birmingham Canal Company* (1), the form of the security did provide for the repayment of the principal money. This is not, we submit, a case in which the Court will exercise its discretion in the way asked, there not being any arrear of interest, nor a consent on the part of all the mortgagees to be paid off. Many of them are under disability, and cannot consent, so that, practically, it would be a breach of trust, and a wrongful act on the part of the company, to pay them all off.

We say then, first, this mortgagee has no right to call in her capital; secondly, if she has such a right, she can only get her money through a receiver, who must act (if at all) on behalf of all the mortgagees, whether assenting dissenting, or under disability, and to the detriment of the concern; and, thirdly, the Court will not, under such circumstances, exercise its discretion in the way proposed.

Where the intention of the Legislature has been to give creditors a right of demanding payment of their capital, there is always express provision for it, as in *Eastern Union Railway Company* v. *Hart* (2).

(1) Kay, 142. (2) 7 Ex. 246; 8 Ibid. 116.

[THE VICE-CHANCELLOR:—Do you say that the company could not pay off the amount of their debt if they wished to do so?]

Mr. *Speed*:—No doubt they could pay off, on due notice being given.

Mr. *Bedwell*, for the Defendant *Bembridge*:—

Payment of interest on any of these mortgage debts is likely to be seriously imperilled if this order be made.

There is a remarkable difference in the language of some of the Acts. Sect. 35 of the Act of 1791 provides that the mortgagees shall hold the rates and premises in proportion to their capital; and the mortgages under the Act of 1798 are to be in "like manner and form." But the Act of 1808 provides that all persons to whom mortgages shall be made or granted, shall be equally entitled to the rates and property assigned, in proportion to the interest of the sums for which such mortgages shall be executed; and the same language is repeated in a subsequent Act, shewing that, as there might be mortgagees holding mortgages at different rates of interest, the intention was that they should hold, not for the purpose of being paid capital, but of being paid interest only.

Not only, therefore, has the time for relief not arrived, there being no arrear of interest, but the right to relief does not exist, and the Plaintiff's bill must be dismissed.

SIR G. M. GIFFARD, V. C.:—

I am satisfied of one thing upon looking at these Acts of Parliament, that they were originally very ill-considered; no one at that time thought of the consequences of the income failing, or of the difficulty which persons might find themselves under in attempting to effect transfers of their securities.

But I think the wording of the Acts of Parliament is plain. It would be a very surprising thing if any doubt could be thrown upon them. I do not think the case is at all influenced by the decision that a party holding a security of this kind cannot bring an action. That rather confirms the case made on behalf of the Plaintiff than not, because in every loan transaction,

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in some shape or other, unless a contract has been come to the other way, there must be implied a right to be repaid. That is the meaning of a "loan," and it is conceded that these advances are loans or charges which the company can pay off if they think fit.

Then let us turn to the terms of the Act of Parliament, and can there be any doubt about the meaning? The power is, first of all, "to borrow and take up at interest" £70,000, or any part thereof, "upon the credit of the undertaking," as to the company should seem fit and convenient; and then the company, and their committee for the time being, after an order made as therein stated, "are thereby fully authorized and empowered to assign the property of the navigation, and the rates" to be granted by the Act to the company, or any part thereof, "as a security for the money so to be borrowed, with interest for the same." That means that it shall be a security for the principal, and a security for the interest also.

I take it, that where a person lends his money, if he is not ever to have his principal paid back, you must have something very definite and clear, shewing that that is a condition of the contract.

But what are the terms of the security? It is that the company sells and transfers "the said navigation, and all and singular the rates" granted to them by the Act, and all their right and interest therein respectively, to hold to the person, his executors, and so on, "until the said sum" (meaning the principal sum), "together with interest for the same after the rate of" so much per cent., "shall be fully paid and satisfied." There can be no mistake about what that contract really is. It is, in point of fact, this: if a person lends his money, he does not forego his right to be repaid, and he has, as a security for that which he lends, the tolls, and a right to receive those tolls until his principal and interest are repaid.

Then I have heard two suggestions founded on those parts of the Acts of Parliament which control this matter. The first is the 36th section of the original Act, and the second those sections of subsequent Acts which have been referred to by Mr. *Bedwell*. But the 36th section of the original Act has not the effect contended for. What the 36th section provides is this, and nothing else: it

provides that no dividend shall be paid to a shareholder until the interest has been paid on the debentures, but it does not go on to say that if a debenture holder requires payment he shall not receive the tolls in respect of his capital. The section is simply this: it provides that "the interest of the money which shall be borrowed shall be paid half-yearly to the several persons entitled thereto in preference to any dividends due and payable by virtue of this Act to the proprietors, and shall be fully discharged or provided for before the yearly or other interest or dividends due to the said proprietors shall be paid;" but it does not go on and say that nothing but the interest shall be paid; and when you get the fact that by this Act of Parliament you can borrow either by way of loan in this way, or upon annuity, the conclusion is inevitable that where you do borrow on securities of this description it is the ordinary case of a loan, in respect of which the parties could not certainly maintain an action, but to which an obligation for repayment must be implied to attach, and that this was an assignment of the tolls on an express trust to repay the interest and principal.

The difference between the subsequent Acts of Parliament and this is only a difference as to the priorities of the mortgagees, and nothing else. If those were Acts of Parliament affecting the question at all, it would amount simply to this, that so long as the mortgagees are all paid their interest you might possibly select and pay off any one who might desire to have his principal paid back. The statutes may possibly have that effect, but they can have no other. That seems to me to be perfectly clear.

Then, as regards the jurisdiction, it is the ordinary remedy of a mortgagee of tolls to come here for a receiver. That is one of the oldest remedies in this Court; and it is admitted here that if there had been an arrear of interest there could have been no action, and hence the appointment of a receiver would really have been the only available remedy. Therefore there is no difficulty as regards that.

Then, as regards the discretion, I have no hesitation in saying that where an application of this kind is made by a creditor whose principal is due, and who has given six months' notice—for him to have a receiver appointed is *ex debito justitiæ*.

Of course the order will follow the usual form. There must,

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first of all, be a declaration of rights, then an order for an account of what is due to the Plaintiff and the other debenture holders, and for the appointment of a receiver. The costs of the suit will be paid in the first instance (the Defendants not objecting to the payment of the Plaintiff's costs), then the receiver will keep down the interest, and pay the balances into Court. There will be liberty to apply.

Solicitors for the Plaintiff: Messrs. *Taylor, Hoare, & Taylor*, agents for Messrs. *Best & Horton, Birmingham.*

Solicitor for the Defendants: Mr. *W. M. Hacon*, agent for Messrs. *Tyndall, Johnson, & Tyndall, Birmingham.*

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In re BRISTOL AND NORTH SOMERSET RAILWAY COMPANY.

Railway Company—Scheme—Confirmation—Assent of Outside Creditors—Railways Act, 1867 (30 & 31 *Vict. c.* 127, *s.* 16).

8 Eq 91-2. 5 Ch 69.

A scheme of arrangement between a railway company and their creditors contained a clause providing that all the creditors other than landowner creditors and *elegit* tenants, should receive in discharge of their claims fully paid-up shares to the amount of such claims, they releasing their debts and claims, and giving up their securities. Upon a petition for confirmation of the scheme, some of the outside creditors appearing and dissenting, the Court refused to make the order, and dismissed the petition.

In every case where a scheme contains a clause seriously affecting the rights of outside creditors, the Court will require the assent in writing of every such outside creditor before it confirms the scheme.

THIS was a petition by the directors of the *Bristol and North Somerset Railway Company* for the confirmation of a scheme of arrangement between themselves and their creditors, which was as follows:—

"The said company,

"Having under the *Bristol and North Somerset Railway Act*, 1863, power to raise capital to the amount of £275,000, in 13,750 shares of £20 each, and having allotted in the usual way on application only 804 shares, and having issued, in payment of the purchase

of land and other debts owing by the said company, 355 shares as fully paid-up, and having irregularly issued or registered in the names of persons as shareholders 9562 shares as fully paid-up, leaving 3029 shares which have not been dealt with in any way;

"Having under the same Act power to borrow on mortgage or bond in the whole the sum of £91,000, when the whole capital should have been subscribed for and one-half thereof paid up;

"Having under the *Bristol and North Somerset Railway (Additional Capital) Act*, 1866, power to raise additional capital to the amount of £100,000 by the issue of new shares, and not having issued any of such shares;

"Having power under the same Act to borrow on mortgage or bond in the whole the sum of £33,500, when the whole of the additional capital should have been subscribed for and one-half thereof paid up;

"Having creditors in respect of the purchase of lands and for compensation to the amount in all of £4061 17*s.* 11*d.*, besides certain outstanding claims, the particulars of which have not been delivered;

"Having, by agreement of the 7th day of August, 1867, arranged with *Benjamin Piercy* and *James Grant Fraser*, tenants by *elegit* of 123A. 2R. 15P. of land belonging to the said company, to pay on the 1st day of July, 1868, in cash or debentures, certain moneys and interest thereon, in respect of which there will then be owing the principal sum of £7595 1*s.* 11*d.* and interest;

"Having creditors (beyond the before-mentioned creditors), claiming to the amount in all of £300,000 or thereabouts, and having irregularly issued debentures to the amount in the whole of £139,000 for securing certain portions of the said sum, and having irregularly issued or registered as aforesaid shares for securing certain other portions of the said sum, and having given *Lloyd's* bonds to the amount in the whole of £59,000 for securing other portions of the said sum;

"Having no money or assets (except certain plant the saleable value of which does not exceed the sum of £3000 or thereabouts) available for the payment of their creditors;

"Having constructed in an efficient manner about one-half part of their line, and having, with but small exception, purchased, or

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given notices for the purchase of, all the lands necessary for the completion of their line;

"Requiring, according to estimate, for the completion of their line the sum of £90,000 or thereabouts;

"Propose, as a scheme of arrangement between the said company and their creditors the following terms, that is to say:—

"1. That the creditors in respect of the purchase of lands and for compensation, to the amount in all of £4061 17*s.* 11*d.*, and such outstanding claims in respect of the purchase of lands and compensation as aforesaid, shall be paid in cash out of the first moneys to be raised on mortgage or bond.

"2. That the said agreement of the 7th day of August, 1867, shall be carried into effect by the payment of the aforesaid sum of £7595 1*s.* 11*d.* and interest, in cash, out of the first moneys to be raised by mortgage or bond (subject only to the prior payment of such creditors as aforesaid in respect of land-purchases and compensation), or in debentures, according to the terms of the said agreement.

"3. That all the other creditors of the company, claiming to the amount in all of £300,000 or thereabouts, shall receive in discharge of their claims fully paid-up shares to the full amount of such claims.

"4. That such last-mentioned creditors shall release their debts and claims, and deliver and give up to the company all securities in respect thereof.

"5. That the company shall have power to raise on mortgage or bond, in the whole, the sum of £150,000, and no more, at rates of interest not exceeding £6 per centum per annum.

"6. That the power of issuing shares above proposed shall be exercisable under the *Railway Companies Act*, 1867, in substitution for the issue of shares under the *Bristol and North Somerset Railway Act*, 1863, and the *Bristol and North Somerset Railway (Additional Capital) Act*, 1866; and the shares to be issued shall rank *pari passu* with the 1159 shares regularly issued as aforesaid under the *Bristol and North Somerset Railway Act*, 1863.

"7. That the power of borrowing above proposed shall be exercisable under the *Railway Companies Act*, 1867, in substitution for borrowing under the *Bristol and North Somerset Railway Act*,

1863, and the *Bristol and North Somerset Railway (Additional Capital) Act*, 1866.

"Sealed with the common seal of the *Bristol and North Somerset Railway Company* this 20th day of November, 1867."

Mr. *Caldecott*, for the Petitioners:—

The present Petitioners are not the directors who led the company into its difficulties.

Mr. *W. Pearson*, for two persons claiming to be debenture creditors, who had not entered an appearance, as directed by the 19th Order.

Mr. *Caldecott* objected to their being heard.

The Vice-Chancellor said that he should not be disposed to exclude any creditor, who had a substantial interest, from being heard.

Mr. *Pearson* submitted that the validity of the debentures could not be tried on this proceeding.

Mr. *Everitt*, for debenture holders who were in possession under the *elegit* (which was for £9595 1*s.* 11*d.*, not £7595 1*s.* 11*d.*), did not oppose the scheme, if it could be amended without re-advertisement.

Mr. *Kay*, Q.C., and Mr. *Renshaw*, Mr. *Druce*, Q.C., and Mr. *Hemming*, Mr. *Martineau*, and Mr. *Lindley*, for other creditors, gave a qualified support.

Mr. *De Gex*, Q.C., and Mr. *Gardiner*, for two judgment creditors, opposed the application.

Mr. *Caldecott* in continuation:—

Creditors, other than mortgagees, debenture holders, and owners of rent-charge, whose rights are expressly provided for by sects. 10, 11, of the statute, are not intended to be, and are not, bound by a scheme when confirmed. It follows that they are not entitled to be heard in opposition. We have not affected to obtain their

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assents; their assent or dissent being equally irrelevant. Sect. 18 evidently refers to outside creditors as persons bound by the scheme.

Nor is there any binding authority on the question. Lord Justice *Wood* (then Vice-Chancellor), thought that outside creditors were bound; the Lord Chancellor (then Lord Justice *Cairns*) thought they were not; in either case the expressions of the learned Judges were *obiter dicta: In re Cambrian Railways Scheme* (1).

If the assents of all the outside creditors be necessary to the confirmation, no scheme will ever reach confirmation, and the Act will be a dead letter.

Sir G. M. Giffard, V.C.:—

As I understand that some of the creditors are not content with the scheme it is impossible to confirm it, unless I can hold that the third and fourth clauses of the scheme would bind all the creditors to whom these third and fourth clauses would refer.

Now, the third clause is: "That all the other creditors of the company, claiming to the amount in all of £300,000, or thereabouts, shall receive in discharge of their claims fully paid-up shares to the full amount of such claims," and then the fourth is: "That such last-mentioned creditors shall release their debts and claims, and deliver and give up to the company all securities in respect thereof." The result of these two clauses is plainly this, to turn creditors into shareholders and to extinguish their debts. Now, if one looks at what fell from the Lord Chancellor in the case of the *Cambrian Railways Scheme*, I think we shall see that what he said is conclusive on the whole subject, and whether that is a decision or a *dictum*, after considering the Act of Parliament, I must for myself say that I quite concur in everything that was said by His Lordship, because it would be monstrous that creditors should be bound by such an arrangement as this, whether they have assented or not assented. It would in fact be this, that you are to say to a man to whom money is owing, "you shall cease to be a creditor, your debt shall be extinguished, it suits me to compel you to take shares in lieu of your debt, and the Court of

(1) Law Rep. 3 Ch. 284 (n), 295-6.

Chancery has power to do that." It would be a very singular Act of Parliament if it gave that power.

Let us see what it is the Lord Chancellor said—I will not go through the whole of his judgment, which was very elaborate, and discussed the sections in different parts of the Act most completely. His Lordship said (1): "I stated at the close of the case of the company, that although this was not the proper time for deciding what would be the effect of the scheme in the present case, I could not, for the purpose of the present application, read the Act as giving it any force or validity, much less the force of an enactment as against outside creditors—that is, general creditors—or against unpaid landowners. The persons against whom it is to have effect are those assenting to it or bound by it; that is, those who have actually agreed to it, or those who, not having agreed to it, are declared by the previous sections to be bound; in other words, the majority and the minority of the various classes whose votes are to be taken. If outside creditors or unpaid landowners were to be bound by the scheme, they must be bound by it even though it postponed or gave them a dividend only on their debts, and they would be in a much worse position than shareholders or debenture holders, for no opportunity is given, or provision made, for their assenting to or dissenting from the scheme." Then further on: "The question, however, remains. Is this a proper case for staying such proceedings? I am clearly of opinion it is not. Without professing to lay down any rule which is to meet every case, I cannot think it would be right that the Court should suspend the proceedings of any unpaid landowner, or, indeed, of any outside creditor, unless it saw that a scheme was proposed in good faith which, if it reached maturity, would afford a reasonable prospect of providing for the payment of the claims of creditors, and thus compensate them for a temporary suspension of their remedies." Then his Lordship read the fifth and seventh articles of the scheme, and the articles of that scheme were in point of fact to compel the creditors to take debentures. A great many of the articles, I think, did not go beyond this, postponing creditors for three or four years. The provisions of this scheme are to extinguish the debt and turn creditors into shareholders. His

(1) Law Rep. 3 Ch. 295, 299.

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Lordship said (1): "These clauses hardly require comment, and indeed were scarcely attempted to be justified by argument. They provide in substance not that the landowner shall be paid, but that he shall not be paid, that he shall lose his right of suit and action, and that in lieu of his debt he shall receive an obligation of the company, for the payment of which no provision is made, and which as to priority is to rank *pari passu* with similar obligations to be given for the claims of other landowners and creditors, and with the whole debenture debt in Schedule (A.) to the scheme. It appears to me to be impossible to suppose, holding as I do that the scheme, if matured, would not bind a landowner or outside creditor, that the Court would during the maturing of the scheme suspend the remedies of the landowner."

Now these *dicta*, at all events, are as plain as can possibly be; and I must confess that I do not see how any one can consider this Act of Parliament without seeing that it did not intend to bind any outside creditor unless that outside creditor actually assented. The terms of the 18th section, I think, are as plain as possible, because the terms of the 18th section really apply to two sets of persons and to two sets of persons only—namely, those who assent and those who are bound. There are antecedent provisions in the statute which say that where there are bondholders or shareholders a majority may bind the minority, and there you have at once those who assent and those who are bound—that is to say, the minority are bound although they may dissent and do not assent.

Therefore, I have no hesitation in saying that, as far as I am concerned, where there is any such clause as this in a scheme attempting to bind outside creditors, I shall refuse to confirm the scheme unless I have their written consent.

Then the 7th clause of the scheme is: "That the power of borrowing above proposed shall be exercisable under the *Railway Companies Act*, 1867, in substitution for borrowing under the *Bristol and North Somerset Railway Act*, 1863, and the *Bristol and North Somerset Railway* (*Additional Capital*) *Act*, 1866." But, as regards capital, the 6th section of the Act of Parliament authorizes provisions for creating, if necessary, additional shares, and raising loan capital—a very different thing from substitutional share and loan

(1) Law Rep. 3 Ch. 299.

capital. And if it be attempted (and it may very likely be attempted in any new scheme) to bring this matter to bear, I think the parties will do well to take care in any provision they introduce for raising money, that that money or any new shares are, strictly speaking, additional and not substitutional, because I think it would lead to a very serious question whether such provisions as are contained in the 7th clause of this scheme are within the meaning of this Act of Parliament.

I am sorry that I cannot confirm the scheme; it is clear that I cannot. It appears to me the vice is so great that it cannot be mended. Of course it will be without prejudice to any new scheme; and I am afraid wherever the parties have entered an appearance, and wherever they ask for it, I must give them their costs against the Petitioners. But I shall only give the costs of those parties whose appearance was regularly entered. If any of the Respondents choose to waive their costs, that must be done out of Court; and in that case their costs will not be inserted in the order.

Solicitors for the Petitioners: Messrs. *Frere, Cholmeley, & Forster.*

Solicitors for the Respondents: Messrs. *Torr, Janeway, & Tagart;* Messrs. *Burt & Stevens;* Messrs. *Flux, Argles, & Rawlins;* Messrs. *Lyne & Holman;* Messrs. *Cunliffe & Beaumont;* Messrs. *Whites, Renard, & Floyd;* Messrs. *Travers, Smith, & De Gex.*

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION.

CURTIS'S CASE.

Company—Winding-up—Contributory—Infant Transferee of Shares.

Where the liquidators of a company seek to place on the list of contributories a person as the holder of shares, and he objects on the ground of his having transferred the shares, it is incumbent on him to shew that at some time or other there was on the register a transferee of his who could be made liable at law in respect of the shares.

Hence, where ten shares were standing on the register of a company in the name of an infant—upon the company being wound up, the Court, on the application of the liquidators, removed the name of the infant from the

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register in respect of the shares, and substituted that of the transferor; although the ten shares originally formed part of a batch of eighty shares which had been purchased on behalf of the infant, all of which eighty shares had, prior to the winding-up, been sold by the infant, the purchase-money received, and the transfers executed by all the purchasers, and the transferees of all (except the ten shares in question), entered on the register of shareholders.

THIS was a summons taken out by the liquidators of the *Imperial Mercantile Credit Association* to have removed from the list of contributories the name of *Annie Savage Curtis*, an infant of between thirteen and fourteen years of age, and that of *Leopold Samson* substituted instead, in respect of ten shares.

The facts were, that in 1864 *Charles Kelson*, the grandfather of *A. S. Curtis*, being then a director of the association, purchased eighty shares in the company for her, and these eighty shares were transferred by *L. Samson* to *A. S. Curtis*, who executed the transfers, and the shares were registered in her name. Dividend warrants for the dividends, payable in January and July, 1865, and in January, 1866, were forwarded to *A. S. Curtis*; and the dividends were received by Mr. *Kelson*, and applied towards her education and maintenance.

In March, 1865, Mr. *Kelson* ceased to be a director.

In March, 1866, and before the call of £5 a share which was made by the directors on the 26th of that month, Mr. *Kelson* sold the eighty shares standing in *A. S. Curtis's* name on the *Stock Exchange*. Transfers for these eighty shares were executed by *A. S. Curtis* in April, 1866, and she received the sale money for the whole. For seventy of these shares the transfers were sent in by the transferees to the association, and their names were duly registered as owners; but for the remaining ten the transferee, a Miss *Ayscough*, who had executed the transfer deed to herself, had not been registered; and in respect of these ten the name of *A. S. Curtis* was on the register when the winding-up order was made, and was still on it.

The association was now being wound up voluntarily under supervision, under an order dated the 26th of June, 1866. Two calls of £5 each were made by the liquidators, one on the 31st of August, 1866, the other on the 26th of June, 1867.

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On the 21st of March, 1868, the infant's solicitors wrote to the solicitors of the liquidators, suggesting that Miss *Ayscough* was the person who would be liable to pay the calls on a bill being filed against her in the infant's name, and proposing to the liquidators to solve the difficulties by taking proceedings themselves to obtain payment of the calls from Miss *Ayscough*. To this the liquidators' solicitors replied on the 23rd of March, stating that Miss *Ayscough* had bought a number of other shares in the association, and that she would be quite unable to discharge the calls made in respect of them; so that proceedings would be useless.

There was nothing in the articles of association about the rights of an infant in or respecting any share, and the only section remotely bearing on the question was the 11th, which provided that the directors might decline to register a transfer, if the transferee were not approved of by them.

Mr. *Kay*, Q.C., and Mr. *Lindley*, for the liquidators:—

It is the duty of the transferor to see that the shares are transferred into the name of a competent person. If they are transferred into the name of an infant the Court will interfere, and see whether it is for the benefit of the infant that the shares should remain in the infant's name or not. If the Court sees that it is not for the benefit of the infant, the infant's name will be taken off and that of the transferor substituted for it: *Reid's Case* (1).

In this case it cannot be for the infant's benefit that the shares should be in her name, seeing that calls have been already made, and more must be made; and if she remains on, the calls will have to be paid by her when she comes of age. No doubt when she comes of age she will be able to repudiate.

The second point is, that she says she has agreed to transfer these shares. But that can make no difference, seeing that the agreement of an infant is void; and if another person cannot compel her to make the transfer to such person, neither can she compel that other person to take the transfer from her.

A third point is this:—As the infant originally had a larger number of shares, which she transferred, and the transfers of all

(1) 24 Beav. 318.

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except these ten have been accepted, and the transferees' names placed on the register, it is said she is not entitled to repudiate these ten, because she cannot also repudiate the rest; for there cannot be a partial repudiation of a contract. But that is a mistaken view, as is shewn by Lord Justice *Rolt's* decision in *Mann's Case* (1), where an infant was allowed to repudiate twenty out of 100 shares held by him.

Mr. *Druce*, Q.C., for the infant:—

There is no *constat* before the Court as to what is, or is not, for the benefit of the infant; and that being the case the Court has no jurisdiction here to say that holding these shares either is, or is not, for the benefit of the infant.

Mr. *F. C. J. Millar*, for *Samson*:—

The Court will not decide this question on this application in the absence of Miss *Ayscough*, who has purchased the shares, paid for them, executed the transfer, paid the director's call, and now holds the share certificates. The question lies between *Samson* and Miss *Ayscough;* and the Court will only deal completely with the equity of the case by putting on the register not the name of the transferor who got rid of these shares two years ago, but of Miss *Ayscough*. If the infant had been adult, would not the Court, upon this application, have put Miss *Ayscough's* name on the register?

The VICE-CHANCELLOR:—Certainly not.

Mr. *Millar*:—I submit the Court would, under the 35th, 98th, and 153rd sections of the *Companies Act*, 1862, have full jurisdiction to deal with the whole equities between the parties.

The only person who can take advantage of the plea of infancy is the infant herself: *Chitty* on Contracts (2).

If the Court replaces Mr. *Samson's* name, it must be as holder of eighty shares, not of ten shares. He must be restored to his original position, if at all; not placed in a position which he never occupied.

[*Drayton* v. *Dale* (3), was referred to].

(1) Law Rep. 3 Ch. 459, n. (2) 8th Ed. p. 150.
(3) 2 B. & C. 293, 299.

SIR G. M. GIFFARD, V.C.:—

I confess I think the question is substantially concluded by *Mann's Case* (1).

The facts of the case are these:—Mr. *Samson*, was possessed at one time of these ten shares, and stood as the registered holder of them. In order to escape liability in respect of these ten shares, it is incumbent upon him to shew that at some time or other there was a transferee of his upon the register who could be made liable at law in respect of these shares; and plainly there was not at the date of the winding-up, nor has there ever been, a transferee of his upon the register who could be made liable in respect of these shares. Besides that, how can any one suppose that a transfer as between him and an infant was a transfer that could be relied upon as excusing him from liability, when we find the form of transfer is, that the infant takes upon herself all the liability of these shares, and agrees to hold them subject to the restrictions and conditions of being made liable.

I have no doubt that such a transfer, as between Mr. *Samson* and the other members of the company, would be a transfer which they might repudiate and set aside, the moment they knew of its being a transfer to an infant. Mr. *Samson's* name, therefore, must be placed upon the register, and he must pay the costs of this application. The infant must provide for her own costs. She need not have come here at all.

Solicitors for the Liquidators: Messrs. *Ashurst, Morris, & Co.*
Solicitors for the Infant: Messrs. *Mackenzie, Trinder, & Co.*
Solicitors for Mr. *Samson*: Messrs. *Pritchard & Englefield.*

(1) Law Rep. 3 Ch. 459, n.

V.-C. G.

1868

June 12.

In re PRICE'S TRUST DEED.

Creditors' Deed—Bankruptcy Act, 1861, *ss.* 192 . . . 197—*Death of Trustees—Appointment of New Trustees by Court of Chancery—Trustee Acts.*

Where the trustees of a trust deed registered under the *Bankruptcy Act*, 1861, have all died, there being no power in the deed of appointing new trustees, the Court of Chancery has jurisdiction, under the *Trustee Acts*, to appoint new trustees.

THIS was a Petition "in the matter of a trust deed, dated the 25th of June, 1866, made between Sir *Charles R. Price*, Bart., since deceased, and *Joseph Marryat*, of the one part, and *William E. Eddison* and *Ralph C. Price* (both since deceased) of the other part," and in the matter of the *Trustee Act*, 1850, and of the 15 & 16 Vict. c. 55, intituled "An Act to extend the Provisions of the *Trustee Act*, 1850," presented by *Simon Adams Beck*, on behalf of himself and all other the creditors of the said Sir *C. Price* and *J. Marryat*, who were entitled to the benefit of the above-mentioned deed.

The Petition stated, that by the deed Sir *C. Price* and *J. Marryat* conveyed all their joint and separate estate to the above-named trustees for the benefit of their creditors, following the form expressed in Schedule D to the Act of 1861; that the deed was on the 20th of July duly registered; that *R. C. Price* died on the 7th of March, 1868, and *W. E. Eddison* died on the 16th of March, 1868, having by will bequeathed all his real and personal estate to his wife and executrix, *Emma Eddison*, but the will contained no specific devise or bequest of trust estates. Mrs. *Eddison* proved the will on the 6th of May; and as the deed contained no power to appoint new trustees, she was applied to as executrix to appoint new trustees under sect. 27 of *Lord Cranworth's Act* (23 & 24 Vict. c. 145), but declined to make such appointment, being advised that the Act did not apply, and that the 197th section of the *Bankruptcy Act*, 1861, made it necessary that new trustees should be chosen in like manner as assignees were chosen in bankruptcy. The Petitioner said he was advised that this could not be done, and that, under the circumstances, it

was expedient that new trustees of the deed should be appointed by the Court.

A committee of creditors, who had been appointed at a general meeting held on the 6th of July, 1866, to act for the protection of the general body, had agreed to the appointment of *William Turquand* and *Henry Bishop* as new trustees; and these persons had consented to act. The Petition prayed that *W. Turquand* and *H. Bishop* might be appointed in the place of the deceased trustees, and that the lands remaining unsold which were subject to the trusts of the deed might vest in *Turquand* and *Bishop* as such trustees for all the estate of *Eddison* and *Ralph Price* therein, and that the right to sue for and recover any *chose in action*, subject to the trusts, or any interest in respect thereof, might vest in *Turquand* and *Bishop* as such trustees.

Mr. *Druce*, Q.C., and Mr. *G. W. Lawrance*, for the Petition:—

The order is asked for under sect. 32 of the *Trustee Act*, 1850, and sect. 2 of the 15 & 16 Vict. c. 55: *Preston* v. *Wilson* (1).

Mr. *Cracknall*, for the executrix, submitted to the Court whether the 197th section of the *Bankruptcy Act*, 1861, did not place the control of affairs under a trust deed within the jurisdiction of the Court of Bankruptcy.

Mr. *Lindley*, for the committee of creditors.

The VICE-CHANCELLOR made the order as prayed; and gave his opinion that the trustees so appointed would be in the same position in all respects as if they had been regularly appointed under a power contained in the deed, had there been one. The costs of all parties, as between solicitor and client, were directed to be paid by the new trustees out of the estate.

Solicitors: Messrs. *Lawrance, Plews, & Boyer*; Messrs. *Beaumont, Thompson, & Beaumont.*

(1) 5 Hare, 185.

V.-C. G.

1868

May 8.

MacHENRY *v.* DAVIES.

Lord Mayor's Court—Fund in Lord Mayor's Court—Suit removed by Certiorari.

17 L.T. 162.

Plaintiff, in an action against Defendant in the Lord Mayor's Court for £80, attached Defendant's balance at her bankers, within the Lord Mayor's jurisdiction. Defendant paid £80 into Court in lieu of special bail, discharged the attachment, and pleaded coverture. The action failed. Thereupon Plaintiff filed a bill against Defendant on the Equity side of the Lord Mayor's Court, which was removed by *certiorari* into this Court.

Motion, on behalf of the Plaintiff, to have the £80 standing in the Lord Mayor's Court paid into this Court, refused.

MOTION.

Richard MacHenry, the Plaintiff in the cause, on behalf of whom this motion was made, had originally brought a common law action in the Lord Mayor's Court against the Defendant, *Mary Anne Elizabeth Davies*, for the sum of £80, which he had advanced to a third party upon a draft drawn by the Defendant on her bankers in the *City*, and had caused an attachment to be issued out of that Court against the account of the Defendant at the bankers. The Defendant put in common bail, paid the sum of £80 into the Lord Mayor's Court, discharged the attachment, and pleaded coverture. *MacHenry* proceeded with the action, and was nonsuited.

He then filed a bill on the Equity side of the Lord Mayor's Court to recover the £80, and a further sum of £147 on a bill of exchange indorsed by Mrs. *Davies*, stating as above, and that he believed Mrs. *Davies* was possessed of separate estate; that he could not recover at law; and praying that he might be paid the debts out of the separate estate. Mrs. *Davies* thereupon filed a bill against *MacHenry* and her husband, praying for a writ of *certiorari*, to have the bill and all proceedings in the Lord Mayor's Court removed into the Court of Chancery, which writ was, on the 23rd of November, 1867, obtained from the Lord Chancellor, and on the 31st of January, 1868, Vice-Chancellor *Wood* ordered the bill to be retained (1).

The present motion was to have the £80 paid into this Court.

(1) Law Rep. 3 Ch. 200, 202.

SC at hearing 16 Ly 68 M.R.

Mr. *Swanston*, Q.C., and Mr. *Jackson*, for the motion.

Mr. *Freeling*, for the Defendant:—

The Plaintiff first brought an action against the Defendant, believing, as he swears he believed, that she was unmarried. In that action he attached for his debt, as he admits in his bill, the whole of her balance at her bankers, so that she could not draw a farthing of it. Mrs. *Davies* thereupon put in common bail, discharged the attachment, and paid the sum into Court. The Plaintiff was nonsuited, and thereupon the whole proceedings in the action, including all claim on the part of the Plaintiff to the £80, came to an end.

We are entitled to withdraw the £80, but the Registrar of the Court has refused to part with it, because this motion was threatened.

This Court has no jurisdiction over the money, in the absence of any contract by Mrs. *Davies* charging the fund.

Mr. *Swanston*, in reply:—

Mrs. *Davies*, though she did not deny, concealed the fact of her being a married woman. Her conduct has amounted to fraud. Her raising money on her drafts amounts to a specific charge on this portion of her separate property.

Sir G. M. Giffard, V.C.:—

The law is, that before a creditor can enforce any remedy against the separate estate of a married woman, he must get a decree, unless he can make out a contract specifically charging a particular fund. That is the result of the decision of the Lords Justices in *Johnson* v. *Gallagher* (1). No such contract can be shewn in this instance.

Over the £80 in the Lord Mayor's Court, therefore, I have no jurisdiction; and the motion must be refused, but the costs will be reserved.

Solicitor for the Plaintiff: Mr. *Rowland Miller*.

Solicitors for the Defendant: Messrs. *Cookson, Wainewright, & Co.*

(1) 3 D. F. & J. 494, 519.

V-C. G.
1868
July 7.

CARDELL *v.* HAWKE.

Creditors' Suit—Practice—Plaintiff's Debt disputed in Chambers—Release—Right of Defendant to tender further Evidence.

After a decree in a suit by a Plaintiff on behalf of himself and all other creditors, the executor may go into fresh evidence in Chambers for the purpose of establishing a case of release, although the allegations in the bill contain statements upon which the defence of release might have been sufficiently raised at the hearing.

THIS was an adjournment from Chambers.

The bill was filed in December, 1866, by the Plaintiff, on behalf of himself and all other the creditors of *James Hawke* deceased, against the executor, stating that the testator at his decease was a partner in a banking firm, of which the Plaintiff was a customer; and that at the testator's death in April, 1861 the firm was indebted to the Plaintiff in a sum of £5820, being the amount of a deposit account standing to the Plaintiff's credit in the books of the firm.

The bill stated that after the testator's decease the surviving partners carried on the business, and the Plaintiff continued to deal with them, keeping both a current and a deposit account. The Plaintiff's deposit account was considerably augmented, whilst on the other hand, there never were any withdrawals from it.

The bill further alleged as follows:—"The Plaintiff has never in any way released or discharged the said testator's estate from the payment of the said debt of £5820, or any part thereof, and the said testator's estate is still indebted to the Plaintiff in the said sum, subject, nevertheless, to credit being given for a proportional part of the dividend received by the Plaintiff as after mentioned."

The bill then alleged that in 1866 the surviving partners executed deeds registered under the *Bankruptcy Act*, 1861, for the benefit of their creditors, under which the Plaintiff had received a dividend of 5s. in the pound, payable to the joint creditors, and that he had received such dividend without prejudice to his claim against the testator's estate.

The bill prayed for a declaration that the surplus of the testator's estate, after paying funeral and testamentary expenses, and

his separate debts, was liable in equity at his death, and was still liable, to the joint debts of the partnership, without prejudice to the liability of the surviving partners as between themselves and the testator's estate; and for administration.

The executor, by his answer, stated that whether the Plaintiff had released or discharged the testator's estate from the payment of the debt depended on the dealings between him and the surviving partners, with which the Defendant was not acquainted. The Defendant went into evidence as to the Plaintiff's dealings with the surviving partners after he was aware of the change of the firm occasioned by the testator's death.

On the 22nd of January, 1868, a decree was made declaring that all persons who were creditors of the testator were entitled to the benefit of the decree, and that the surplus of the testator's real and personal estate was liable, as prayed above; and decreeing administration.

Proceedings were being prosecuted in Chambers; and the Defendant had filed fresh affidavits to shew that the Plaintiff had so dealt with the surviving partners as to discharge the estate of the testator.

The Plaintiff objected to the admission of this new evidence, and the hearing of the objection was adjourned into Court.

Mr. *De Gex*, Q.C., and Mr. *Begg*, for the Plaintiff:—

There is no doubt about the ordinary rule, that where a Plaintiff sues on behalf of himself and all other creditors he must prove his debt over again in Chambers, although he may have established it at the hearing: *Owens* v. *Dickenson* (1); *Field* v. *Titmuss* (2). But this rule has never been extended to a case where the existence of the debt has been in issue at the hearing between the same parties, and on exactly the same grounds. So to extend it would be to introduce all the mischief which would arise from allowing witnesses to supplement their evidence after they have seen exactly how it would affect the case. Even the *Statute of Limitations*, which might have been set up by the executor at the hearing, if not then set up, cannot be set up by him in Chambers against the Plaintiff's debt: *Fuller* v. *Redman* (No. 2)(3). So in

(1) Cr. & Ph. 48, 56. (2) 1 Sim. (N.S.) 218. (3) 26 Beav. 614.

V.-C. G. 1868 CARDELL v. HAWKE

this case the Defendant is not entitled to go into evidence in Chambers to set up a case of release going to the foundation of the Plaintiff's claim, the question not being one of amount, but of whether the Plaintiff's debt was not extinguished by reason of his having continued to be a customer of the firm of the surviving partners, who dealt with the testator's estate.

In *Whitaker* v. *Wright* (1) it was held to be open to an executor in Chambers to impeach the validity of a bond upon grounds which were not in issue in the cause (which was a creditor's suit), at the hearing. But in this instance the question of release was in issue at the hearing.

Release is a question of principle, which must be disposed of at the hearing; the *quantum* of a debt is subject matter for Chambers.

Mr. *Haynes*, for the Defendant, relied upon *Whitaker* v. *Wright*.

Mr. *De Gex*, in reply.

SIR G. M. GIFFARD, V.C.:—

I am quite satisfied that the decision in *Whitaker* v. *Wright* goes the whole length of this case.

If *Whitaker* v. *Wright* had been a suit by an incumbrancer, the decree would have established the debt, and it would have been impossible afterwards to have raised the issue of usury. But upon an ordinary decree in a creditor's suit the Court does not treat the decree as conclusively establishing the Plaintiff's debt; and a new case may be made in Chambers, and fresh evidence gone into. In taking the accounts in Chambers, payment may surely be proved; and if so, why not release?

I hold that the objection is without foundation, and that the Defendant is at liberty to go into further evidence.

Solicitor for the Plaintiff: Mr. *J. Elliott Fox*, agent for Mr. *Chilcott, Truro.*

Solicitors for the Defendants: Messrs. *Hooke & Street*, agents for Mr. *Cock, Truro.*

(1) 2 Hare, 310.

LONDON BANK OF MEXICO AND SOUTH AMERICA *v.* HART.

V.-C. G.
1868
June 11.

Practice—Evidence—Examination out of Jurisdiction—Form of Order.

Form of order appointing examiners to act out of the jurisdiction, discussed.

MR. *CHARLES HALL*, on behalf of the Defendants, applied for a commission to examine certain witnesses at *Bogotá*, in *South America*.

The Registrar (Mr. *Rogers*) stated that the present practice was not to issue a commission, no written interrogatories being necessary, but that the order was for the examination of witnesses before a special examiner; the names of three or four persons on the spot, one of whom was to act as special examiner, to take the *vivâ voce* examination of the witnesses, being inserted in the order.

Mr. *Eddis* appeared on behalf of the Plaintiffs, who had nominated *E. F.* and *L. M.* (both English residents at *Bogotá*), but declined to allow *E. F.* to be appointed alone as special examiner on behalf of both parties. The other persons named in the order were nominated by the Defendants.

The order made was in the following form:—

Upon motion this day made, &c., it is ordered that *A. B.* and *C. D.* of *Bogotá*, in the *United States of Colombia*; *E. F.* (Englishman) H.M. *Chargé d'Affaires* to the *United States of Colombia*; *G. H.* and *I. K.* and *L. M.* (an Englishman) all of *Bogotá*, be appointed examiners for taking the examination of witnesses residing at *Bogotá*, or elsewhere, in the *United States of Colombia*; and it is ordered that *A. B.* and *E. F.* do alone act as such examiners, unless they or either of them is by illness or other sufficient cause incapacitated from acting; and in case the said *A. B.* is so incapacitated from acting, *C. D.* is to act in his place as one of such examiners, but if the said *C. D.* is so incapacitated as aforesaid, then the said *G. H.* is to act as one of such examiners, and if the said *G. H.* is so incapacitated as aforesaid, then the said *I. K.* is to act as one of such examiners, and in case the said *E. F.* is so incapacitated as aforesaid, then the said *L. M.* is to act as one of such examiners.

Solicitors: Messrs. *Sharpe & Co*; Messrs. *Flux, Argles, & Rawlins.*

V.-C. G.

1868

July 13.

ADAMES *v.* HALLETT.

Voluntary Settlement—Post-obit Bond—Voluntary Bondholder—13 *Eliz. c.* 5.

A creditor under a voluntary *post-obit* bond is as much entitled to the benefit of the statute of the 13 Eliz. c. 5, as any other creditor.

Where a testator, having executed a voluntary *post-obit* bond for securing an annuity of £100 to his daughter-in-law for her life, afterwards made a voluntary settlement, from and after his decease, in favour of his widow and child, comprising all his property (except about £300), and before his death acquired only about £1000 more:—

Held, that the settlement was void under the statute as against the bond creditor.

THIS bill was filed on the 21st of August, 1866, by *George Adames* and *Augusta* his wife, and, as re-amended, stated as follows:—

On the 8th of July, 1857, the testator in the cause, *Thomas Bridger Adames*, the father of the female Plaintiff's former husband, she being then a widow and in straitened circumstances, executed a bond, in which his heirs, executors, and administrators were bound, to *Augusta Adames*, in a penal sum, which bond was conditioned to be void on payment by the testator of an annuity of £30 during the testator's life by quarterly payments.

By another bond of even date, the testator, his heirs, executors, and administrators became bound to *Augusta Adames* in a penal sum, with a condition for making the bond void on payment by the testator, his heirs, executors, or administrators, to *Augusta Adames* of an annuity of £100 during her life by quarterly payments, the first of such payments to be made at the expiration of six calendar months after the testator's death.

On the 30th of July, 1857, the Plaintiffs were married, *George Adames* being a first cousin of the testator.

In the year 1859 the testator, as the bill stated, "repented of having executed the said bonds, and became desirous of defeating the same, and with that object" executed a deed of settlement, dated the 25th of February, 1859.

By this deed, which was made between the testator, *Thomas Bridger Adames*, and *Frances* his wife, of the first part; the

Defendants, *Charles Hallett*, and *Ellen* his wife, of the second part; and *John Stares* and the Defendants *William Jeffery*, *Henry Hallett*, and *Edward Combes*, of the third part; in consideration of the natural love and affection which *T. B. Adames* bore to *Frances* his wife, and *Ellen Hallett* (who was his daughter), *T. B. Adames* granted to the use of *Stares*, *Jeffery*, *Hallett*, and *Combes*, and their heirs, a messuage, cottages, and farm, lands, and hereditaments, called *Sefter Farm*, and two pieces of land in the parish of *Pagham*, *Sussex*, and certain great tithes, upon trust to pay the rents and profits to *T. B. Adames* and his assigns during his life, and after his decease to *Frances Adames* and her assigns during widowhood; and after the determination of such trust, upon trusts for sale, and to invest and pay the income during the life of *Ellen Hallett*, for her separate use, without anticipation; and after her death, if *Charles Hallett* should be then living, to him for life; and after the death of the survivor to stand possessed of the fund for the benefit of the children; in default of children as *Ellen Hallett* should by deed or will appoint, and in default, for her next of kin. By the same deed *T. B. Adames* assigned to the trustees all his household effects, then being in and about the messuage or dwelling house at *Chichester*, in his occupation, upon trust to permit and suffer him to use and enjoy the same during his life, and after his death upon trust for *Frances Adames* absolutely. The deed contained the usual covenant by *T. B. Adames*, for himself, his heirs, &c., that he had not done or knowingly suffered, or been party or privy to anything whereby the premises thereby granted or assigned, or any part thereof respectively, were or might be impeached, affected, or incumbered in title, estate, or otherwise howsoever; and also the usual covenant for further assurance.

On the same 25th of February, 1859, the testator made his will, whereby he confirmed the settlement that day made by him of his real estate and household goods, and gave and bequeathed all other the personal estate of which he might die possessed to his wife, *Frances Adames*, for her own absolute use and benefit; and appointed his wife and *Charles Hallett* his executors.

He died on the 10th of May, 1866, leaving his widow and only child, *Ellen Hallett*, surviving.

The annuity of £30 was duly paid up to the last quarterly day

V.-C. G. 1868 ADAMES v. HALLETT

of payment before the testator's death; but the payment of the annuity of £100 was refused by the executors, who at first disputed the validity of the bond; and afterwards, admitting the validity of the bond, said that the unsettled estate of the testator was insufficient to satisfy it.

The Defendants to the suit were Mr. and Mrs. *Hallett*, the surviving trustees of the settlement, *Jeffery*, *Hallett*, and *Combes*, Mrs. *Adames*, and the children of Mr. and Mrs. *Hallett*; and the bill prayed for a declaration that the settlement of the 25th of February, 1859, was fraudulent and void as against the Plaintiffs; and that, in the event of a deficiency of the real and personal estate to satisfy the bonds as well as the other debts, such deficiency ought to be made good by a sale of the property comprised in the settlement, and for administration.

From the evidence it appeared that the settlement of the 25th of February, 1859, comprised all the property the testator then possessed, except a sum of £99 1*s.* 8*d.* at his bankers, and a sum of £210 due for half-a-year's rent of his farm at the preceding Michaelmas. At his death his balance at his bankers amounted to £1335 16*s.*

Mr. *Kay*, Q.C., and Mr. *Woodroffe*, for the Plaintiffs:—

The settlement is clearly fraudulent and void within the statute of the 13 Eliz. c. 5.

We admit that the trustees of the settlement are entitled to their costs: *Daking* v. *Whimper* (1). These we must pay and recover over with our own, but only, we submit, after our own have been paid. The other Defendants are clearly not entitled to costs: *Elsey* v. *Cox* (2).

Mr. *Druce*, Q.C., and Mr. *Freeling*, for the Defendants:—

The question is, whether a volunteer under a voluntary bond is such a creditor within the statute of *Elizabeth* as that he can set aside a settlement, though voluntary. The statute is declaratory only of what was the common law before it passed; and it was not the object of the framers of the statute to protect volunteers;

(1) 26 Beav. 568, 571. (2) 26 Beav. 95.

Twyne's Case (1). They did not intend to do more than to protect the "real" debts of the settlor.

The Defendants, moreover, have the benefit of the settlor's covenant for further assurance, which creates a debt binding on his heirs: *Williamson* v. *Codrington* (2); *Cox* v. *Barnard* (3).

If any effect is to be given to the covenant at all, it must neutralize the contention on the other side; for the moment the bondholder takes anything out of the estate, he invades our right, supposing us to be *pari passu*.

The settlement cannot be bad in itself. The testator is not shewn not to have had in 1857 sufficient assets to cover the amount. Suppose he had acquired enough before his death to satisfy the bond. No one then could have pretended that he contemplated any fraud against the Plaintiffs.

But further, is this deed a fraudulent impediment in the way of persons in the position of the Plaintiffs, who are mere *post-obit* bondholders? A *post-obit* bond does not create such a debt as entitles the holder to set aside a deed *inter vivos*, though voluntary. We say that the deed *inter vivos* is entitled to priority: *Hales* v. *Cox* (4); *Holmes* v. *Penney* (5); *Patch* v. *Shore* (6); or at least that a Court of Equity will not interfere to protect the *post-obit* bondholder.

SIR G. M. GIFFARD, V.C.:—

This case has been very ingeniously argued, but I confess I do not feel pressed by the difficulties which have been raised.

First of all, if the debt had been a debt for value, the only objection to the relief sought would be, that it is a *post-obit debt;* but I do not conceive that that can make the slightest difference. The question is, whether at the date of the settlement the testator did or did not abstract from his property that which was absolutely essential to satisfy the bond. Whether the bond had become due by his death, a day, or a week, or a month, or a year after, is immaterial. The evidence upon that subject is quite clear. The bond is a bond for an annuity of £100 a-year, and he

(1) 3 Rep. 80; 1 Sm. L. C. 6th Ed. pp. 10 *et seq.*
(2) 1 Ves. Sen. 512.
(3) 8 Hare, 310.
(4) 32 Beav. 118.
(5) 3 K. & J. 90.
(6) 2 Dr. & Sm. 589.

V.-C. G. 1868 ADAMES v. HALLETT.

settled every particle of his property, reserving a life interest to himself, with the exception of about £300, and when he died he had saved something like £1000. That being so, I think that if the debt had been a debt for value, although *post-obit*, beyond all doubt it would have come within the decided cases on the subject.

Then does it make the slightest difference, as regards the statute of *Elizabeth*, that this is a voluntary debt and not a debt for value? I apprehend when you consider that statute in a suit of this description, you look at what the legal rights of the parties are; and, beyond all doubt, in a Court of law a debt of this kind would be a perfectly good debt, and the creditor would be, to all intents and purposes, a perfectly good creditor, and constituted a creditor by an act *inter vivos*. If that is his position in a Court of Law, I am at a loss to see why, as regards a voluntary settlement under the statute of *Elizabeth*, his legal rights should not be given to him in this Court. I am of opinion he is clearly entitled to the same rights in this Court as he would be entitled to in a Court of Law, and I cannot in the least see why, if you once affirm the proposition that a voluntary debt is good in a Court of Law, that a voluntary debt should not, for the purposes of the statute of *Elizabeth*, be held a good debt in this Court. I am, therefore, of opinion that the debt is one which the statute of *Elizabeth* strikes at just as much as if it had been a debt for value.

That being so, it is said that there is in this deed, which is in my opinion void under the statute, a covenant which might give rights. My answer to that is this—that what the result might have been if there had been simply a covenant, or simply a bond unconnected with the deed, which was bad under the statute, it is not necessary to say. What we have here is a deed which is confessedly bad under the statute, and with reference to which I must say it is clear, both in law and on the facts as appearing by the evidence, that it was executed for the very purpose of defeating this particular debt. That being so, I am of opinion that no part of this deed can, by possibility, be set up against the Plaintiffs. Therefore there will be the ordinary declaration.

Mr. *Kay* referred to *Spirett* v. *Willows* (1), in which the declara-

(1) 34 L. J. (Ch.) 365, 368; 11 Jur. (N.S.) 70, 71.

3 Sel. Ch. L. 293

tion was, that the deed was fraudulent and void as against the Plaintiff, and that the property comprised in it was applicable in payment of the Plaintiff's debt and interest, and his costs of suit.

THE VICE-CHANCELLOR said he could not make a declaration in that form, as there might be other debts; but he would give the Plaintiffs priority as regarded their costs of suit. The deed must be declared void as against all the creditors. The estate must be administered first; but no part of the deed could be set up against the Plaintiffs; covenant or no covenant. There must be the usual administration decree up to the point of selling the real estate; administration of the personalty first, and if that should be deficient, then of the realty. The costs of the trustees must come out of the estate.

Solicitors for the Plaintiffs: Messrs. *Robinson & Preston*, agents for Messrs. *Johnson & Raper, Chichester.*

Solicitors for the Defendants: Messrs. *Eyre & Co.*, agents for Messrs. *Gunner & Renny, Bishops Waltham.*

FURNISS *v.* MIDLAND RAILWAY COMPANY.

Lands Clauses Act, 1845, *s.* 92—*Part of a Manufactory—Goit, Shuttles, and Mill-house.*

A manufactory sometimes worked, or in part worked, by water-power, had a reservoir which was supplied by a goit, into which water was turned out of a natural river at some distance off. At the point where the goit commenced there was a weir in the river; there were shuttles for regulating the flow of water into the goit, and a mill-house for the occupation of a man whose duty it was to attend to the shuttles.

A railway company gave notice to treat for certain parcels of land, including the weir, shuttles, mill-house, and parts of the bed of the river (which was included in the Plaintiff's lease, though not forming part of the manufactory), and of the goit. They proposed to pass over the shuttles, weir, mill-house, river, and goit, by bridges:—

Held, that they were bound, under the 92nd section of the *Lands Clauses Act*, to take the whole manufactory.

19 L 85.
22 L D 31
46

THE Plaintiffs, *Henry Furniss, Edward Hudson, Edward Tozer*, and *Thomas Saunderson Furniss*, were in business as iron and steel

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manufacturers, under the firm of *Saunderson, Brothers, & Co.*, at *Sheffield*. Their premises, held under two leases, one of which comprised part of the manufactory proper and the adjuncts, and the other the remaining part of the manufactory, consisted of:—1. A rolling mill, forges, or works for making iron into steel and rolling the same, called *Attercliffe Forge*, on the bank of the river *Dun*, with various outbuildings; 2. A head goit, leading to a reservoir, containing 2 A. 3 R. 23 P., whereby water was conveyed from the *Dun* some distance above *Attercliffe Forge*, and stored in the reservoir for the supply of water power to the manufactory; 3. A bridge over the head goit, whereby access was given from *Attercliffe Forge* by a public way to the water-house below mentioned, and certain shuttles in or under the bridge, by the raising or lowering of which the flow of water was regulated; 4. Other shuttles, situate in the angle between the river and the head goit, which also assisted in regulating the flow of water; 5. A mill-house, situated in the same angle, which was occupied by a man whose duty it was to regulate the flow of water by means of the shuttles; 6. A weir across the *Dun*, whereby water was turned into the goit; and, 7. A plot of land containing about 10,360 square yards, with forges and other buildings erected thereon; 8. Part of the bed of the river *Dun*.

The *Midland Railway Company*, on the 15th of July, 1867, gave the Plaintiffs notice to treat for nine pieces or parcels of land described in the notice as follows:—A portion of the river *Dun* and weir, 20½ perches; a house, building, yard, and garden, 8½ perches; the head goit, foot bridge, and flood gates, 24 perches; the head goit, 20½ perches; and another garden and buildings, three fields and a strip of land, comprising altogether 2 A. 0 R. 39 P.

The object of the railway company was to cross the goit, which was of curvilinear course, twice; and at the second crossing to take or go over the shuttles, bridge, bridge-house, and weir, at the point where the water was turned out of the river into the goit.

Before the service of this notice a negotiation had been commenced between the Plaintiffs, as lessees, and their reversioners on the one hand, and the company on the other, with a view of getting the waterworks shifted to a point lower down the stream, the Plaintiffs, on that footing, being willing to let the company

take those pieces of land and hereditaments only which were specified in their notice; but in March, 1868, this negotiation failed.

On the 19th of March, 1868, notice to enter on the premises comprised in the notice of the 15th of July was served by the company, and on the 25th of April the Plaintiffs' solicitors sent a counter-notice, requiring the company to take the whole of the manufactory. At this date the compulsory powers of the company for taking land had expired.

No answer having been received, this bill was filed in the same month of April for an injunction to restrain the Defendants, the company, from taking, entering on, or intermeddling with the parts of the Plaintiffs' manufactory mentioned in the notice of the 15th of July, 1867, or any of them, or any part thereof, unless and until they had paid for the whole of the manufactory.

On the 14th of May the Defendants' solicitors, in acknowledging receipt of the notice of motion, wrote as follows:—

"We desire to inform you that the railway will be carried over the goit and shuttles by bridges, so as not to interfere with the waterway, shuttles, or sluices."

The evidence on behalf of the Plaintiffs went to shew that the parcels of land described in the company's notice of the 15th of July, comprised hereditaments which were most important parts of the manufactory, and indispensable for carrying it on.

The Defendants' affidavits shewed that, on the 20th of March, 1868, the company's solicitors applied to the Board of Trade to appoint a surveyor under the *Companies Act*, 1867, and a Mr. *Hunt* was appointed, who determined the value of the hereditaments comprised in the notice to treat of the 15th of July, 1867, to be £630, including compensation for all damage and injury. The surveyor assumed that the railway would be carried over the goit and shuttles.

Mr. *Hawksley*, an engineer, deposed that the manufactory was worked partly by water-power and partly by steam, and that the greater part of the machinery could be, and in fact was, driven by steam-power; also, that in his opinion the works of the company, who intended to carry their railway by two bridges over the

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stream of sufficient span to clear the stream and its banks, and also the shuttles situate in the angle, would not in the least interfere with or affect the manufactory, or interfere with the flow of water.

Mr. *Kay*, Q.C., and Mr. *Bagshawe*, now moved for the injunction:—

The only question is, whether the Defendants can, under the 92nd section, take that part of the goit (being land of the Plaintiffs' covered with water) over which they mean to carry their line, and the shuttles, bridge, and mill-house, without also taking the manufactory, the reservoir of which is fed by means of the goit. The case is within *Sparrow* v. *Oxford, &c., Railway Company* (1), and *Pinchin* v. *London and Blackwall Railway Company* (2).

By taking the section of the goit, they would acquire a right to stop it up altogether: *Spackman* v. *Great Western Railway Company* (3).

The three indispensable parts of the manufactory which the Defendants propose to take, are the water-power, the mill-house, and the bridge and shuttles. The water-power is essential on grounds of economy, though the Plaintiffs may and do use steam-power.

Sir *Roundell Palmer*, Q.C., and Mr. *Speed*, for the company:—

There is no authority for the proposition that a running stream is part of a manufactory. We admit we are bound not to stop the flow of the stream.

The Plaintiffs might have got all they wanted under the accommodation works clause (sect. 68) of the *Lands Clauses Act*.

The Defendants allowed our compulsory powers to expire by waiting a whole year before they served their counter-notice.

In *Reddin* v. *Metropolitan Board of Works* (4) Lord *Westbury* said: "I think that the cases which have been decided upon this part of the statute have already gone far enough. In my experience companies have been rather the victims of the statute than individuals."

(1) 2 D. M. & G. 94.
(2) 1 K. & J. 34; 5 D. M. & G. 851.
(3) 1 Jur. (N. S.) 790.
(4) 31 L. J. (Ch.) 660-6.

The real object of the application is to compel us to carry out the arrangement for taking the waterworks lower down the river.

The Court will not grant an injunction where the balance of inconvenience is greatly on the side of the Defendants.

SIR G. M. GIFFARD, V.C.:—

I am of opinion that the injunction must be granted in this case.

The Court has not to consider what the nature of the accommodation works may be. What it has to consider is this:—Notice is given, and very properly given, to take certain land, and, no doubt, the company cannot do what they intend to do without taking that land, part of it being land covered with water. That being so, the sole question I have to consider is, whether the land so intended to be taken is part of the manufactory within the meaning of the 92nd section; and, regard being had to the decided cases, I think it is.

Let us consider for a moment what the nature of the property is. First of all, there is the house of the man who looks after the shuttles; there are the shuttles by which the supply of water is regulated; and then there is the goit: the whole of them, as far as I can see, connected with the reservoir, and the reservoir connected with the manufactory. The water-power is, in fact, part of the motive power of the manufactory, and is sworn to be essential to the manufactory.

That being so, the conclusion I have come to is, that what is proposed to be taken is part of the manufactory within the meaning of the 92nd section, quite as much as the place where the cinders were put in the case of *Sparrow* v. *Oxford, &c., Railway Company* (1), and quite as much as the cottages in *Spackman* v. *Great Western Railway Company* (2).

Under these circumstances the injunction must be in the terms asked for, because, with respect to its being one manufactory, the evidence is all one way. It is true there are two titles, but I do not think that matters; the Plaintiffs must make out a proper title to the whole property. One part of the process is carried on in one

(1) 9 Hare, 436; 2 D. M. & G. 94.

(2) 1 Jur. (N.S.) 790.

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part of these buildings, and another in another, both processes being essential to the completion of the manufacture of the iron or steel, or whatever the product may be.

I think, therefore, there must be an injunction in the terms asked; but, of course, if the Defendants can bring forward any evidence as to what is done in the different parts of the manufactory, this being an interlocutory application, they can do so, either at the hearing or before.

Solicitors for the Plaintiffs: Messrs. *Torr, Janeway, & Tagart,* agents for Messrs. *Furniss & Son, Sheffield.*

Solicitors for the Defendants: Messrs. *Beale, Marigold, & Beale.*

STEWARD *v.* BLAKEWAY.

M. R.
1868
July 21, 24.

Co-ownership of Real Estate—Investment of Profits in Land—Partnership—Real or Personal Estate.

Certain hereditaments, being partly agricultural land and partly a quarry, were vested in several co-owners in undivided shares. The quarry was worked, and the agricultural land let, and the rents thereof received by one of the co-owners on behalf of the rest; and the yearly rents and profits, after payment of outgoings and expenses, were in general divided among the owners in proportion to their shares. In some years, however, the profits were laid out in the purchase of lands in the same locality, and these were partly agricultural lands and partly used in connection with the quarry. The purchased lands were conveyed to the managing owner for the time being, and managed by him in the same way as the lands originally belonging to him and the other co-owners:—

Held, that the share of one of the co-owners, who died intestate, in the purchased lands descended to her heir-at-law, and did not pass to her legal personal representative.

FOR many years previously to 1845 certain freehold and leasehold hereditaments in the island of *Portland* (consisting partly of agricultural land, and partly of a valuable quarry of *Portland* stone), had been vested in undivided shares in various members of a family of the name of *Steward*. In 1845, Miss *Georgina Wharton Steward*, one of the family, intermarried with the Defendant *Blakeway*, and on the occasion of the marriage her share in these hereditaments was conveyed to trustees upon trust for her separate use during her life.

Both before and after 1845 the quarry was worked by one of the co-owners of the above-mentioned hereditaments on behalf of the others; and the agricultural lands were let, and the rents thereof received by such managing owner for the time being. No written agreement had ever been entered into respecting such management; but after payment of all outgoings and expenses (including the cost of the necessary implements and engines for raising the stone) the yearly rents and profits were in general divided among the owners in proportion to their shares in the hereditaments. In some years, however, the managing owner laid out considerable portions of such rents and profits in advantageous

M. R. 1868 STEWARD v. BLAKEWAY.

purchases of other lands in the same locality. The lands so purchased were partly used in connection with the quarry, and were partly agricultural, and were all conveyed to the managing owner, and were managed by him in the same way as those which originally belonged to the *Steward* family.

Considerable purchases were thus made subsequently to 1845, and during the lifetime of Mrs. *Blakeway*; and upon her dying intestate her share of the purchased lands was claimed on the one hand by the Plaintiff as her heir-at-law, and on the other by Mr. *Blakeway* who was her legal personal representative.

The bill in this suit was filed against Mr. *Blakeway*, and the persons in whom the legal estate in the purchased lands was vested, for the purpose of enforcing the Plaintiff's rights thereto.

The Defendant *Blakeway*, by his answer, alleged that the *Steward* family had entered into a partnership for the purpose of working the quarries under the style or firm of "*Stewards & Co.*": and in support of such allegation he relied much on the facts that the stone dug from the quarry was consigned to a wharf in *London*, over which was painted in large letters, "*Stewards & Co.*"; that this wharf was always used and occupied in connection with the quarry, and that the stone consigned to it was there sold and delivered to customers: and that the accounts for the stone so sold were made out in the name of "*Stewards & Co.*"

Mr. *Jessel*, Q.C., and Mr. *C. A. Holmes*, for the Plaintiff:—

This is not a case of partnership. It may be that as regards the world the members of the *Steward* family may have held themselves out as, and may be subject to the liabilities of, partners; but as between themselves they are simply co-owners of land who have carried on a trade with a view to the more beneficial enjoyment of their lands. Where the trade is the principal object, and land is purchased by partners in trade in order to enable the trade to be carried on: no doubt in equity the land, being part of the partnership property, is treated as personal estate: but where the land is the principal object, and the trade is merely ancillary to the beneficial enjoyment of it, that doctrine does not apply.

Mr. *W. Brodrick*, for the trustees of the lands.

Mr. *Renshaw* (Mr. *Baggallay*, Q.C., with him):—

Whether or not there is a partnership in the original lands, it is quite clear that there is a partnership in the working of the quarry; and these purchases were made to enable the partnership to be carried on more advantageously. These purchases must therefore be treated as accretions to Mrs. *Blakeway's* share of the partnership assets, and as personal estate: *Darby* v. *Darby* (1); *Bank of England Case* (2); *Wild* v. *Milne* (3).

Mr. *Jessel*, in reply, referred to *Lindley* on Partnership (4).

LORD ROMILLY, M.R.:—

In this case I am of opinion that this property is all real estate. I think that the distinction was very properly drawn in the course of the argument, and that in all these cases you must look at the whole character of the property you are dealing with, and see what the property is ancillary to; whether the land is ancillary to the trade, or whether the trade is ancillary to the land. It is in this case difficult to say what is the trade: at least, I question if that can properly be called a trade which consists merely in digging out a portion of the soil and selling it: it is not like digging out iron ore and then turning it into iron bars, in which case unquestionably there is a trade attached to the occupation of the land. I do not doubt that in many cases, particularly where brewers have bought freehold public-houses, the land is ancillary to the trade, because it is essential that a brewer shall have a great number of places where he can sell the produce of his brewery. But that is not so where there is a quarry which belongs to two or more joint tenants, or two tenants in common, and they merely dig out part of the soil and sell it. In my opinion that is a case of real property: the trade is merely ancillary to the property which, upon the death of one of the individuals, goes to the heir-at-law. The only difficulty in this case is, that the produce or profits of the trade have been laid out again in land. Unquestionably it has usually happened where that is the case that the land so purchased has been considered as part of the trade pro-

(1) 3 Drew. 495. 2 Jur. N.S. 271
(2) 3 D. F. & J. 645.
(3) 26 Beav. 504.
(4) Vol. i. p. 670.

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perty. But that would not be so if the profits were laid out in land which had nothing to do with the trade, and that is, to a great extent, the case here. A large portion of the whole is not used in the trade, it is simply let on agricultural leases to agricultural tenants. It is difficult to say how I can distinguish between the portions which are used in connection with the trade and those which are not. In my opinion the trade is ancillary to the estate, and the produce having been laid out in land, a considerable portion of which does not belong to the trade at all, I think that I must hold that the intention of the parties was that all the purchased land should be held in the same way as the land which originally belonged to them with the quarry in it, and I therefore will make a declaration that Mrs. *Blakeway's* share was real estate, and belongs to the Plaintiff.

Solicitors: Mr. *Steward*; Mr. *Rees*; Messrs. *C. & C. R. Cuff.*

M. R. 1868 *July* 10, 13.

COX *v.* FONBLANQUE.

Will—Legacy—Condition Precedent—Bankruptcy—Annulment.

A legacy was given to *A.* "if not an uncertificated bankrupt at the testator's death." *A.* was a bankrupt at the testator's death, but his bankruptcy was annulled four months afterwards:—

Held, that *A.* was not entitled to the legacy.

White v. *Chitty* (1), and *Lloyd* v. *Lloyd* (2), distinguished.

J. S. M. FONBLANQUE, the late Commissioner in Bankruptcy, by his will, dated the 5th of August, 1865, directed his executors to invest so much of his residuary estate as would produce £100 a year, and to pay the same sum to his son, *J. W. M. Fonblanque* (if not at his death outlawed, or an uncertificated bankrupt, or through his own act or default, or by operation or process of law, or otherwise, disentitled to receive and enjoy the same), during his life, or until he should be outlawed, or become bankrupt, or assign, charge, or incumber, or attempt to assign, charge, or incumber, the said annual sum or some part thereof, or do or suffer something whereby the same or some part thereof would, through his own

(1) Law Rep. 1 Eq. 372. (2) Law Rep. 2 Eq. 722.

act or default, or by operation or process of law, or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons; and from and after the determination of the trust thereinbefore declared in favour of his said son, or in the event of the failure of that trust, then from and after the testator's death the portion of his residuary estate directed to be set apart for the purpose of the said annuity should sink into his residuary estate.

The testator died on the 3rd of November, 1865.

J. W. Fonblanque had been adjudicated bankrupt on his own petition on the 20th of September, 1865, and on the 2nd of March, 1866, the bankruptcy was annulled on his own petition, with the consent of all the creditors who had claimed or proved.

This was a suit for the administration of the testator's estate, and the only question was, whether *J. W. M. Fonblanque* was entitled to the annuity.

Mr. *Jessel*, Q.C., and Mr. *Brooksbank*, for the Plaintiffs, the executors, and Mr. *Roxburgh*, Q.C., Mr. *Fry*, Mr. *Cabell*, and Mr. *G. O. Edwards*, for the residuary legatees :—

The bequest of the annuity was made on the express condition that the annuitant should not be a bankrupt at the testator's death, which condition has not been fulfilled, therefore the bequest fails. The subsequent annulment of the bankruptcy did not make it void *ab initio : Smallcombe* v. *Olivier* (1). In *White* v. *Chitty* (2), and *Lloyd* v. *Lloyd* (3), there was first a gift, and then a proviso for forfeiture on bankruptcy, and it was held that a bankruptcy which existed before the testator's death and was annulled before the assignees had interfered to realize the property, did not create a forfeiture; but here the testator distinctly points to the state of things existing at his death, imposes a condition precedent, and directs that in the event of the failure of the trust then "from and after his death" the annuity fund shall sink into his residuary estate.

Mr. *Daniel Jones*, for *J. W. M. Fonblanque* :—

This case is governed by *White* v. *Chitty* and *Lloyd* v. *Lloyd*.

(1) 13 M. & W. 77. (2) Law Rep. 1 Eq. 372.
(3) Law Rep. 2 Eq. 722.

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The principle of those decisions is, that as the testator's main intention was to benefit the legatee personally and, if that were impossible, not to benefit his creditors, and as the bankruptcy, being annulled, would not, in fact, prevent the legatee from enjoying the legacy, or give the benefit of it to his creditors, the Court in order to give effect to the obvious intention will strain the language, and hold that there was not such a bankruptcy as the testator intended, and there is no reason why that principle of construction should not be applied to a condition precedent as well as to a proviso for forfeiture. Conversely, the Court in favour of the intention will stretch words of futurity so as to apply the forfeiture clause to a bankruptcy existing before the testator's death: *Manning* v. *Chambers* (1); *Seymour* v. *Lucas* (2). According to that principle the annuitant was not, within the meaning of the will, a bankrupt at the time of the testator's death, and therefore there was no failure of the trust. Suppose he had been adjudicated a bankrupt in his absence, and on false affidavits, he would literally not have fulfilled the condition, but it would be monstrous to deprive him of the annuity in such a case.

Mr. *Bedwell*, for a trustee.

Mr. *Jessel*, in reply.

July 13. Lord Romilly, M.R.:—

I think that there is very little doubt about this case. The testator directs the annuity to be paid to his son "if not at his death outlawed, or an uncertificated bankrupt," and the son was an uncertificated bankrupt at his father's death. The gift was only made provided the donee was not a bankrupt; that was a condition precedent annexed to the gift; he was a bankrupt, he did not fulfil the condition, consequently there was no gift. The cases which have been cited do not appear to me to have any application to this case; those were cases of conditions subsequent, in which the annulment of the bankruptcy prevented the effect of the condition, but here no subsequent annulment could prevent him from

(1) 1 De G. & Sm. 282. (2) 1 Dr. & Sm. 177.

having been a bankrupt at the testator's death. It was urged that a man might be made bankrupt improperly. The testator, from his experience in the Court of Bankruptcy, may have considered that such a thing was or was not probable, but however that may be, if a testator chooses to annex a condition to a gift the Court must give effect to the condition without considering whether it is reasonable. In this case the condition was not fulfilled, and I must declare that *J. W. M. Fonblanque* is not entitled to the annuity.

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Solicitors: Mr. *Jaquet;* Mr. *W. R. Harris;* Messrs. *Edwards & Edwards;* Mr. *G. Harrison.*

PARDO *v.* BINGHAM.

M. R. 1868 *July* 27.

Administration—Equitable Assets—Foreign Law—Priority—Domicil—Lex loci contractus.

Where a debt is contracted by an Englishman in a foreign country the provisions of the *lex loci contractus* do not avail to entitle the creditor to payment of his debt out of equitable assets administered in this country in priority to other creditors.

Where, therefore, an Englishman residing in *Venezuela* executed an instrument to secure repayment to *G.* of £1600, and *G.* afterwards registered the instrument in the form prescribed by the law of *Venezuela*, and by virtue of such registration became entitled, according to that law, to be paid his debt out of the general assets of the debtor in priority to other creditors:—

Held, nevertheless, that a fund in this country constituting equitable assets of the debtor must be divided among the creditors without regard to any such priority.

THIS was a creditors' suit for the administration of the estate of *Augustus Frederick Hamilton*, and now came on to be heard on further consideration.

Mr. *Hamilton* was an Englishman by birth, but was at the time of his death, and had been for many years previously, resident in *Venezuela*. It did not appear, however, that he had acquired a domicil in that country.

In 1846 *Hamilton* executed, in *Venezuela*, an instrument in the

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Spanish language for the purpose of securing to one *Level de Goda* the payment of a sum of £1600. This instrument was registered in *Venezuela* in accordance with the forms prescribed by the law of that country; and by virtue of such registration *De Goda* became entitled, according to that law, to be paid the sum so secured out of *Hamilton's* general assets in priority to all the other creditors.

The only fund available to the creditors consisted of two sums of bank annuities, over which *Hamilton* had a general power of appointment by will, which he had exercised.

The question was now raised whether the Court, in distributing this fund, would give effect to the priority acquired by *De Goda* over the other creditors of the testator.

Mr. *Edward Cutler*, for the Plaintiffs:—

It must be assumed that *Hamilton* was an Englishman by domicil.

The fund, being equitable assets, ought to be divided amongst the creditors *pari passu*.

Mr. *Mackeson*, Q.C., for the executors of the testator.

Mr. *Hemming*, for the representatives of *Level de Goda*:—

I cannot say that it has been established that Mr. *Hamilton* was domiciled in *Venezuela*. If anything turns on that, an inquiry ought to be directed. Setting that point aside, the case stands thus:—An Englishman resident in *Venezuela* contracts a debt with a native of that country. By the law of that country there is a power, which there is not in *England*, given to debtors and creditors to settle by contract the order in which debts shall be paid, not only out of specific funds, but out of the general assets of the debtor after his decease: that power has been exercised, and the priority so gained is part of the contract between the parties. Now, admitting that the assets must be administered according to the law of this country, and that the rule here is to distribute equitable assets *pari passu* among the creditors: still that is a rule which applies only after all the obligations under particular contracts have been satisfied. This is not a question of the rule of administration, but of contract. The contract must have effect according

to the *lex loci contractus*, and the fund ought, therefore, to be applied in payment of the debt due to *De Goda* in priority to the debts of other creditors, just as if the testator had given his creditor a specific charge on it.

Mr. *John Cutler*, for other creditors.

LORD ROMILLY, M.R.:—

Unless both the debtor and the creditor were domiciled in *Venezuela*, I think that the registration of this document can only affect assets in *Venezuela* over which that country has power.

I do not think that I can properly direct an inquiry as to the domicil, unless a strong case is made out for the purpose. It was the duty of Mr. *Hemming's* client to make out his case; and he ought not to come here upon one ground, and when that fails, try to succeed upon another. If any inquiry, therefore, is to be directed, it must be upon a special application made to me. That being so, I am of opinion that a debt contracted with a foreigner by an Englishman living abroad does not entitle the foreigner, by reason of any particular law of his country, to claim priority in payment of his debt out of a fund which, by the law of this country, is equitable assets for the benefit of all the creditors of the debtor. The fund must be distributed according to the law of this country; and I will make an order accordingly.

Solicitors: Messrs. *Cutler & Turner;* Messrs. *Walker, Twyford, & Belward.*

M. R.
1868
June 9.

EYTON *v.* DENBIGH, RUTHIN, AND CORWEN RAILWAY COMPANY.
RICKMAN *v.* JOHNS.

Railway Company—Rent-charge—Power of Distress—Chattels assigned to Trustees —Receiver—Leave to distrain—Lands Clauses Act, s. 11.

Lands were conveyed to a railway company by various persons in consideration of rent-charges. The company became unable to pay the rents, and a suit was instituted by the owner of one of the rent-charges on behalf of himself and all the other owners of rent-charges who should come in and contribute to the expenses of the suit for the payment of the rent-charges; and a decree was made, and a receiver of the tolls, profits, and income of the undertaking appointed. The company, by deed, conveyed and assigned their superfluous lands and chattels to trustees upon trust for the benefit of the creditors of the company, and a suit was instituted by a creditor on behalf of himself and all other creditors entitled to the benefit of the trust deed for the administration of the trusts thereof: a decree was made, and a receiver appointed in this suit also.

Upon the application of the owner of a rent-charge for leave in both suits to distrain for arrears of rent on land conveyed by him to the company:—

Held, that he was entitled to such leave in the first suit, but not in the second.

THE *Denbigh, Ruthin, and Corwen Railway Company* had made considerable purchases of lands required for the purposes of their undertaking in consideration of annual rent-charges. In 1867 the company became unable to pay these rent-charges, and *Mary Eyton*, the owner of one of the rent-charges, instituted the first of the above-named suits on behalf of herself and all other persons entitled to rent-charges created in respect of purchases of land by the company who should come in and contribute to the expense of the suit against the company, and certain debenture holders and judgment creditors of the company, for the payment of the rent-charges, and for the appointment of a receiver. In April, 1867, an interlocutory order was made appointing a receiver of the tolls, and profits, and income arising out of the undertaking of the company, and in January, 1868, a decree was made in the cause, and thereby (amongst other things) the receiver was continued.

By an indenture, dated the 25th of March, 1867 (which was

afterwards duly registered as a bill of sale), the superfluous lands belonging to the company, and also the engines, carriages, waggons, rolling stock, plant, implements, furniture, fixtures, stores, chattels, effects, and articles belonging to the company specified in the schedule thereto, were conveyed and assigned to trustees upon trust to take possession thereof when they should think proper in the interest of the creditors of the company, and thereafter to sell, hold, and apply the same for the benefit of the creditors in manner therein mentioned. On the 29th of March, 1867, the bill in the suit of *Rickman* v. *Johns* was filed by *John Rickman* on behalf of himself and all other creditors of the company entitled to the benefit of the trusts of this deed, against the trustees and the company, praying for the administration of the trusts of the deed; and it was thereby alleged that the rolling stock and chattels comprised in the deed were not necessary for the prosecution of the company's undertaking, and that the company was competent to dispose thereof without in any manner incapacitating itself from carrying on such undertaking. In this suit a receiver of the property, subject to the trusts of the deed, was appointed; and in January, 1868, a decree was made, directing the trusts to be carried into effect, and continuing the receiver.

In April, 1868, liberty was granted in the suit of *Eyton* v. *Denbigh, Ruthin, and Corwen Railway Company* to one *John Price* (who had conveyed land to the company in consideration of an annual rent-charge, reserving by the conveyance a power of distress over the lands conveyed, or any other lands belonging to the company), to distrain for rent-charge in arrear on the land conveyed by him to the company. The case is reported (1).

An application was now made in both suits that liberty might be granted to *Richard Miles Wynne* to distrain on land conveyed by him to the company, for the sum of £48 due to the applicant for rent-charge in arrear up to the 1st of February, 1868. The conveyance to *Wynne* was made in consideration of an annual rent-charge of £32, covenanted to be paid by the company half-yearly on the 1st of February and the 1st of August. In point of form this conveyance was stated to be, with a few unimportant exceptions, precisely similar in form to that to *Price;* but the

(1) Law Rep. 6 Eq. 14.

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power of distress was not thereby expressly reserved. A station had been built on the land conveyed.

Mr. *Bradford* (Mr. *Jessel*, Q.C., with him), in support of the application :—

This application differs from that of *Price*, inasmuch as it is made in the suit of *Rickman* v. *Johns* as well as in that of *Eyton* v. *Denbigh, Ruthin, and Corwen Railway Company*. The principle, however, is the same in both cases. The holder of the rent-charge has a title paramount to that of the company, and all persons claiming under them; and is entitled to enforce it by distress on the lands conveyed under the 11th section of the *Lands Clauses Act*, or under 4 Geo. 2, c. 28, s. 5.

Mr. *Baggallay*, Q.C., and Mr. *A. E. Miller*, for the Plaintiffs in the two suits :—

We offer no opposition to an order being made in the first suit, but as to the application in *Rickman* v. *Johns* we say that the only right of the applicant is to distrain on the goods and chattels of the company. But all chattels not necessary for carrying on the undertaking have been assigned to trustees and have become their property : therefore the Court will not give leave to distrain in *Rickman* v. *Johns*. As to the rolling stock and other chattels necessary for carrying on the undertaking, they cannot be interfered with : *Gardner* v. *London, Chatham, and Dover Railway Company* (1); 30 & 31 Vict. c. 127, s. 4.

Mr. *Dryden*, for the company :—

By sect. 11 of the *Lands Clauses Act* the rents are charged only on the tolls and rates. It has been decided that mortgagees have a charge on the undertaking only ; and it is nowhere provided that holders of rent-charges are to have any priority over mortgagees.

[The MASTER OF THE ROLLS :—The rent-charge is the price of the land : and unless the Act says that a company may take land and not pay for it, I shall hold that a rent-charge is the first charge on the land conveyed, as being the vendor's lien for unpaid purchase-money. I shall make an order similar to that in *Price's Case :* but as to the property comprised in the deed, I must hear a reply.]

(1) Law Rep. 2 Ch. 201.

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Mr. *Bradford*, in reply:—

The property comprised in the deed is not necessary for working the undertaking. We are grantees of a rent-charge; and by sect. 5 of 4 Geo. 2, c. 28, are entitled to the same remedy as a landlord in the ordinary case of landlord and tenant. We are, therefore, entitled to distrain on all goods and chattels we may find on the land we have conveyed.

LORD ROMILLY, M.R.:—

I will give you an order that you shall be at liberty to distrain in the suit of *Eyton* v. *Denbigh, Ruthin, and Corwen Railway Company*, but not in *Rickman* v. *Johns*. I do not think I can allow you to take goods which are expressly conveyed to trustees; nor can I allow you to take the locomotives that happen to pass over your land for the purpose of working the line. I will give you the same order as in *Price's Case*, but further than that I cannot go.

Solicitors: Messrs. *Rooks, Kenrick, & Harston*: Mr. *Noyes*.

In re JOINT STOCK DISCOUNT COMPANY.

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July 11, 13.

LODER'S CASE.

Bill of Exchange—Insolvency of Acceptor and Guarantor—Security given by Acceptor to Guarantor—Appropriation.

Company *A.* guaranteed bills for £35,000 accepted by company *B.*, and company *B.* assigned to company *A.* certain property as security for the payment of the bills. Both companies were wound up by the Court, and the holders of the bills, who had no notice of the security, proved against both estates for the whole amount of the bills, and recovered from company *A.* £21,000, and from company *B.* £5250; afterwards the security was realized, and produced £23,500:—

Held, that the proceeds of the security were part of the estate of company *A.*, and were divisible among its creditors.

Ex parte Waring (1) considered.

4 Ch 428
7 Eq 453
12 Eq 502

BY an agreement, dated the 25th of November, 1865, and made between the *Contract Corporation, Limited*, of the first part, the

(1) 19 Ves. 345.

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Joint Stock Discount Company, Limited, of the second part, and Messrs. *Jervis, Bravo, & Rixon,* of the third part; after reciting that a sum of £35,000 had been raised by means of acceptances of the *Contract Corporation,* guaranteed by the *Joint Stock Discount Company,* and had been deposited with the Dutch Government, in the names of *Jervis, Bravo, & Rixon,* in respect of a concession for the construction of certain railways, the corporation, in consideration of the liability so incurred by the company, assigned to the company all their interest in the concession and in the deposit, as a security for the payment of the bills.

In March and April, 1866, before the bills had arrived at maturity, the corporation and the company were ordered to be wound up by the Court.

The holders of the bills, Mr. *Loder* and Messrs. *Foster,* who had discounted them without notice of the agreement of November, 1865, proved for the full amount of the bills against the estates of both companies, and received from the estate of the corporation a dividend of 3*s.*, and from that of the company a dividend of 12*s.* in the pound.

Under an arrangement, sanctioned by the Court, between the official liquidators of the two companies, the liquidator of the corporation had received £25,986 10*s.*, in respect of the deposit comprised in the agreement of November, 1865, and had been ordered to pay the balance of that sum, after deducting £2,500 for the costs of realization, to the liquidator of the company, to be placed to a separate account, and not to be paid out without notice to Messrs. *Loder* and *Foster.*

This was a summons by the official liquidator of the *Joint Stock Discount Company* that he might be at liberty to distribute this fund among the creditors of the company.

It was stated by the official liquidator's counsel that the fund would be sufficient to produce a dividend of 2*s.* in the pound, and that the company would ultimately be able to pay all its debts in full.

Mr. *Jessel,* Q.C., and Mr. *Locock Webb,* for the official liquidator:—

This application is opposed by the holders of the bills, who

insist that the fund in Court ought to be appropriated to the payment of what remains due to them on the bills. As they were not parties to the agreement of November, 1865, and had not even notice of the security when they discounted the bills, they have no direct or independent lien on the fund, but they will contend that, upon the authority of *Ex parte Waring* (1), they have an indirect equity, arising from the necessity of adjusting the equities between the estates of the two companies, to have the security applied in discharge of the bills. But the principle of *Ex parte Waring* only applies where the estates of the two parties liable on the bills one of whom has given security to the other, are both bankrupt, and, according to the rules of administration in bankruptcy, the security is first applied in or toward discharge of the bills, and the bill-holders prove for the balance against both estates. But the winding up of a company is not a bankruptcy, it is not even a judicial declaration of insolvency: *Hickie & Co.'s Case* (2); and the estate is not administered as in bankruptcy, but according to the practice of the Court of Chancery: *Kellock's Case* (3). The rule in *Ex parte Waring* is a special mode of payment in bankruptcy: *Laycock* v. *Johnson* (4). In *Powles* v. *Hargreaves* (5) the estate of the drawers of the bills, who held the security, was being wound up under a deed which provided that all questions should be decided according to the law of bankruptcy. In *Inman* v. *Clare* (6), where the bill-holder had got a transfer of the security, it was held that but for that transfer he could not have insisted on the appropriation of the security to the payment of the bills. But, in fact, these bill-holders have received in dividends more than the amount of the security, and there is no doubt that they, and all the other creditors of the *Discount Company*, will be paid in full.

Mr. *Baggallay*, Q.C., and Mr. *Langworthy*, for the bill-holders:—

The rule in *Ex parte Waring* applies whenever the two indebted estates are insolvent, and under a forced administration, whether in this Court or in Bankruptcy: *Powles* v. *Hargreaves;*

(1) 19 Ves. 345.
(2) Law Rep. 4 Eq. 226.
(3) Ibid. 3 Ch. 769.
(4) 6 Hare 199; 16 L. J. (Ch.) 350.
(5) 3 D. M. & G. 430.
(6) Joh. 769.

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the *dictum* in *Laycock* v. *Johnson* (1) was overruled by the decision in *Powles* v. *Hargreaves* (2), where Lord *Cranworth* said, that in *Ex parte Waring* (3) Lord *Eldon* could not possibly have meant to confine the principle to the case of a double bankruptcy in the technical sense; in *Powles* v. *Hargreaves* one of the estates was not even judicially insolvent, and the effect of that case is, that provided there be actual insolvency, it need not, for the purpose of applying the rule in question, be judicially established: *Hickie & Co.'s Case* (4). Here both estates are under a forced administration, and though it is said that the *Discount Company* is solvent, the Court cannot assume that to be so. If the fund in Court is to be set off against the amount which has been paid in dividends, the bill-holders are entitled, according to *Ex parte Waring*, and *Powles* v. *Hargreaves*, to receive a dividend on the balance of their debts, after deducting the amount of the security. We ask that a sum sufficient to pay the balance of the bills may be set apart, as was done in *Hickie & Co.'s Case*, until it is ascertained whether the company can pay its debts in full.

Mr. *Jessel*, in reply.

July 13. LORD ROMILLY, M.R.:—

In this case I am of opinion that the holders of these bills of exchange are not entitled to have the benefit of this security in the way in which they ask for it. They get the benefit of it indirectly; they get the benefit of it in this way, that the estate of the *Joint Stock Discount Company*, of which they are creditors, is increased by that amount, but the security is not specifically given to secure these bills in their hands. The state of the case is this:—On the 26th of November, 1865, the *Contract Corporation* and the *Joint Stock Discount Company* entered into a contract by which the *Joint Stock Discount Company* guaranteed the acceptances of the *Contract Corporation*, and the corporation assigned to them, as a security against their guarantee, a sum of money deposited with

(1) 6 Hare, 199; 16 L. J. (Ch.) 350.
(2) 3 D. M. & G. 430. 17 Jan 1853
(3) 19 Ves. 345.
(4) Law Rep. 4 Eq. 226.

respect to a Dutch railway. That security has produced the sum of £23,500, which has been paid over by the *Contract Corporation*, and is now in Court to the credit of the *Discount Company*. Mr. *Loder* and Messrs. *Foster* discounted the bills, amounting to £35,000, which were drawn for the purpose of this transaction, but they were wholly ignorant of this security, they knew nothing at all of the contract entered into between the parties, and did not advance their money on faith of it; they are *bonâ fide* holders of the bills, and of course entitled to prove. They did prove, in fact, against both companies, because they were bills accepted by the *Contract Corporation* and guaranteed by the *Joint Stock Discount Company*, and of course both the companies are liable for the full amount of these bills. They have already received a dividend of 3*s.* in the pound from the *Contract Corporation*, and a dividend of 12*s.* in the pound from the *Joint Stock Discount Company*. I omit from consideration altogether the alleged fact that the *Joint Stock Discount Company* is solvent, and will pay all its debts in full; no doubt that would, if it were established, determine the question, but I do not go into that. The fact is, there has been more paid to the bill-holders than the amount of the security, which really disposes of the whole matter, and therefore they are entitled to nothing more. I hold that *Ex parte Waring* (1), and all that class of cases, in which Lord *Eldon* laid down the law very distinctly, amount to nothing more than this, that where there is a double bankruptcy, or insolvency if you please (I am not at this moment entering into the question whether the rule is restricted technically and specifically to bankruptcy or not), and there are bills which one bankrupt is entitled to claim against the other, that must be set right as between the two estates, the consequence of which is, that the bill holders, though they get the benefit of any security that has been given for the bills, as Lord *Eldon* says, indirectly, have no species of right to the security itself, and that, in my opinion, is the effect of all these decisions. In the present case I shall direct the dividend to be paid at once, and I shall set nothing apart for the bill-holders; they will receive their dividend with the other creditors, and will be paid, as I understand, 2*s.* in the pound; they

(1) 19 Ves. 345.

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will then have received 17*s.* in the pound, and I think it is very reasonably probable that the remaining 3*s.* in the pound will be paid. The official liquidator will have his costs out of the estate. I cannot give the Respondents any costs.

Solicitors for the Official Liquidator: Messrs. *Lawrance, Plews, & Boyer.*

Solicitors for the Respondents: Messrs. *Venning, Robins, & Venning;* Messrs. *Roy & Cartwright.*

M. R. 1868 *May* 28; *July* 20.

HODGKINSON *v.* KELLY.

Contract—Custom of Stock Exchange—Sale of Shares—Indemnity—Voluntary Winding-up under Supervision — Commencement of Winding-up — Companies Act, 1862, *ss.* 84, 130, 148, 151.

A. bought of a jobber on the *Stock Exchange* shares in a company, and afterwards, the company having in the meantime stopped payment, *B.* sold to another jobber on the *Stock Exchange* shares in the same company at a lower price for the same settling-day. On the name-day *A.*'s name was given to *B.* as the purchaser of *B.*'s shares; *B.* executed a transfer of the shares to *A.*, and delivered the transfer and certificates to *A.*'s broker, who paid him the price for which *A.* purchased the shares; *A.* afterwards repaid his own broker, and took away the transfer and certificates, but did not execute the transfer, and it was never registered:—

Held, that *A.* was liable to indemnify *B.* against all consequences flowing from the ownership of the shares subsequent to the execution of the transfer, and that this liability arose from the nature of *A.*'s original contract, according to the custom of the *Stock Exchange*, by which the buyer or seller of shares undertakes to buy or sell from or to the person whose name is given to him on the name-day.

Semble, when a voluntary winding-up is ordered to be continued subject to supervision, the winding-up is to be deemed to commence from the date of the resolution authorizing the winding-up, and not of the presentation of the Petition on which the order is made.

ON the 28th of April, 1866, the Defendant, *Simon Kelly*, instructed *Renton*, a broker, to purchase for him on the *Stock Exchange* twenty shares in *Overend, Gurney, & Co.*, and *Renton* accordingly purchased the shares from *Paine*, a jobber, for £14 12*s.* 6*d.* per share for the 15th of May. On the 10th of May *Overend, Gurney, & Co.*

stopped payment, and on the 11th a Petition to wind up the company was presented, and two provisional liquidators were appointed. On the 14th of May the Plaintiff, *Grosvenor Hodgkinson*, instructed *Lowndes & Co.*, brokers, to sell 100 shares in *Overend, Gurney, & Co.*, he being then the registered holder of that number of shares, and they, on that day, sold the 100 shares on the *Stock Exchange* to *Bristowe Brothers*, jobbers, at £1 per share for the 15th of May. On the same day, being the name-day, a ticket giving the name of the Defendant as the purchaser of 15 of the 100 shares was, in the usual course of the *Stock Exchange*, passed from *Renton* through the intermediate jobbers to *Lowndes & Co.* On the 23rd of May the Plaintiff executed a transfer of fifteen shares to the Defendant, and *Lowndes & Co.* delivered the transfer, with the certificates of the shares, to *Renton*, who paid them £219 7*s.* 6*d.* (£14 12*s.* 6*d.* per share), of which they paid the Plaintiff £1 per share, and settled the difference with *Bristowe Brothers*. *Renton* then required the Defendant to repay him the £219 7*s.* 6*d.*; this he at first declined to do, on the ground that the company had stopped payment after he bought the shares, but ultimately he paid the money, and took away the transfer and certificates, but did not execute the transfer. On the 11th of June, 1866, a resolution was passed to wind up the company voluntarily, and on the 22nd of June an order was made upon the Petition, which had been presented on the 11th of May, that the voluntary winding-up should be continued under the supervision of the Court. The Plaintiff was placed on the list of contributories in respect of the fifteen shares, and had been compelled to pay two calls of £10 per share. In June, 1867, he filed the bill in this suit to obtain from the Defendant the repayment of the amount of the two calls, and indemnity against all further calls in respect of the fifteen shares, and all liabilities and expenses incurred or to be incurred in consequence of his being made a contributory.

The Defendant, by his answer, alleged that he had not been party or privy to any contract with the Plaintiff; that he had bought twenty shares from *Paine*, and had never recognised the Plaintiff as his vendor, or executed the transfer of the Plaintiff's shares to him; and submitted that even if he had agreed on the 28th of April to purchase the Plaintiff's shares, the agreement was put an

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end to and made incapable of performance by the stoppage of the company and the commencement of the winding-up, which prevented the registration of a transfer.

Mr. *Jessel*, Q.C., and Mr. *Eddis*, for the Plaintiff:—

Having regard to the rules and practice of the *Stock Exchange*, the Defendant, having paid the purchase-money, and taken and retained the deed of transfer and the certificates of the shares, has become the purchaser of the Plaintiff's shares, and is consequently liable to indemnify him: *Hawkins* v. *Maltby* (1); *Evans* v. *Wood* (2); *Grissell* v. *Bristowe* (3).

Mr. *Baggallay*, Q.C., and Mr. *Higgins*, for the Defendant:—

There has been no contract between the Plaintiff and the Defendant. The Plaintiff sold 100 shares to *Bristowe* for £1 per share; the Defendant purchased twenty shares from *Paine* for £14 12*s.* 6*d.* per share. By certain arrangements, according to the practice of the *Stock Exchange*, which is not proved to have been known to the Defendant, his name was given to the Plaintiff as the purchaser of fifteen of the Plaintiff's shares, but the Defendant has never sanctioned that arrangement, or adopted the Plaintiff as his vendor. He paid his own broker, as he was legally bound to do, the price he had agreed to give to *Paine* for the shares which he purchased, but he did not authorize the broker to pay that money to the Plaintiff, and his taking away the transfer deed without executing it did not amount to an acceptance of the Plaintiff's shares. In *Grissell* v. *Bristowe*, although the transfers to the nominees of the purchaser had been executed by the vendor and delivered to the brokers of the nominees, it was held that the original purchaser, and not the nominees, was liable to indemnify the vendor against calls, and that has been followed in *Coles* v. *Bristowe* (4). In *Paine* v. *Hutchinson* (5) it was held that the first purchaser was bound to indemnify the original vendor, and consequently was entitled to be indemnified by the sub-purchaser to whom the original vendor had executed a transfer. So here,

(1) Law Rep. 4 Eq. 572; 3 Ch. 188.
(2) Ibid. 5 Eq. 9.
(3) Law Rep. 3 C. P. 112.
(4) Ibid. 6 Eq. 149.
(5) Law Rep. 3 Eq. 257; 3 Ch. 388.

the Defendant is liable to a suit by *Paine*, his vendor. *Sheppard* v. *Murphy* (1) was precisely the same case as the present, and there it was held that there was no privity between the vendor and the purchaser's nominee. In *Evans* v. *Wood* (2) the transferee had executed the deed of transfer, by which he expressly agreed to accept the shares, and he would have registered it but for accidental delay. In *Hawkins* v. *Maltby* (3) the bill was dismissed.

The Plaintiff sold his shares after the commencement of the winding up of the company, when it had become impossible to clothe the purchaser with the legal ownership by registration, and it has never been decided that in such a case a vendor is entitled to indemnity.

[The MASTER OF THE ROLLS:—Did the winding-up commence before the passing of the resolution on the 11th of June?]

The Petition on which the order to continue the voluntary winding-up under supervision was made, was presented on the 11th of May, and the effect of ss. 84, 148, and 151 of the *Companies Act*, 1862, is, that in such a case the winding-up must be deemed to commence at the time of the presentation of the Petition: *In re Hydraulic Tube-drawing and Steel Ordnance Company*, before Vice-Chancellor *Malins*, 3rd of March, 1868.

[The MASTER OF THE ROLLS:—I do not know that it is material in this case, but I should be disposed to think that when the Court, upon a Petition for a compulsory winding-up, orders a voluntary winding-up to be continued under supervision, it must be treated as if the Petition had been amended by stating the resolution for a voluntary winding-up, and praying for its continuance under supervision, and that, under sect. 130 of the Act, the winding-up commences from the date of the resolution.]

Mr. *Jessel*, in reply:—

Execution of the transfer by the transferee is not essential to constitute acceptance of the shares. In *Grissell* v. *Bristowe* (4) *Bovill*, C.J., says: "When transfers have been executed or accepted by the transferees, they are, no doubt, responsible and liable to

(1) Ir. Rep. 1 Eq. 490; since reversed on appeal, 16 W. R. 948.
(2) Law Rep. 5 Eq. 9.
(3) Ibid. 4 Eq. 572; 3 Ch. 188.
(4) Law Rep. 3 C. P. 133, 136.

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indemnify the transferor, as was decided in *Evans* v. *Wood* (1) and *Hawkins* v. *Maltby*" (2); and *Byles*, J., says: "If the nominee having received the transfer, refuses to register, the seller's remedy is, I conceive, against the nominee."

The winding-up commenced with the resolution. How can an order for continuing a winding-up alter the time of its commencement? If the order is made on a Petition presented long after the actual commencement of the winding-up, would it postpone the commencement of the winding-up to the date of the presentation of the Petition, and throw all the intermediate proceedings of the liquidators into confusion? The 148th section of the Act only relates to the jurisdiction of the Court over actions and suits; the 151st section was not intended to make the 84th section applicable to winding-up under supervision. But assuming that the winding-up commenced on the 11th of May, the subsequent contract for the sale of shares is valid: *Biederman* v. *Stone* (3), and the vendor is entitled to indemnity.

July 20. LORD ROMILLY, M.R.:—

This case raises a very important question, which has been much discussed of late in all parts of the kingdom. [His Lordship then stated the facts, and continued:—] In considering cases of this description it is necessary, in my opinion, to guard against two errors of a very different character, which are frequently involved in the arguments addressed to the Court. One is, that the question of the right to indemnity depends on the question whether the list of shareholders, or, in other words, of contributories, can be altered; and the other is, to suppose that these contracts for the sale of shares on the *Stock Exchange* are exactly like, and must depend on exactly the same principles as are applicable to, contracts for sale and purchase of other matters, such as a house and the like. As to the first, it is proper to observe, that the question of the list of the shareholders and the variation of that list has nothing to do with the matter.

(1) Law Rep. 5 Eq. 9. (2) Law Rep. 3 Ch. 188.
(3) Law Rep. 2 C. P. 504.

Where the Court of Chancery has refused to alter the list of shareholders or of contributories it has, in most cases, expressly guarded against the inference that the decision of the Court can have the slightest effect upon the equities which may exist between the person who sold and the person who bought the shares, or between the person who persuaded another to take and the person who took shares in a company. The cases are essentially distinct; whether *A.* shall remain on the list of shareholders or *B.* be substituted for him, is a question between *A.* and the company, that is, between him and all the other shareholders of the company, but the question whether *B.* shall indemnify *A.* against the consequences of *A.* remaining a shareholder, is a question solely between *A.* and *B.*, with which the company, that is the rest of the shareholders, have nothing to do. Again, *B.* by various wilfully false representations persuades *A.* to take shares in a company; on the strength of *A.* being a shareholder many other persons take shares; *A.* cannot get his name taken off the list, but *B.*, having by false representations induced *A.* to become a shareholder, is liable to *A.* to make good to him the loss he has sustained by trusting to the false representations of *B.* It would be an unnecessary waste of time to go through the cases, which are very numerous, to shew that this distinction has always been present to the mind of the Court in deciding these cases, and that it ought always to be kept in view. Of course this observation does not apply to cases where the false representations are made by the company itself or its authorized agents, where the Court has held that the company cannot derive any benefit from its own wrong, such as *Central Railway Company of Venezuela* v. *Kisch* (1). The distinction is obvious, and will be readily recognised without any reference to the decided cases.

The other error which, in my opinion, pervades most arguments on this subject, is the omission to perceive that when a man sells or buys shares through his broker on the *Stock Exchange*, he enters into an implied contract to sell or buy according to the custom and usages prevalent in that body. For instance, in this case it was strongly argued that there was no privity between the Plaintiff and the Defendant, that they personally entered into no contract

(1) Law Rep. 2 H. L. 99.

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with each other, and that neither authorized any agent to enter into a contract with the other. The *Stock Exchange*, with its ramifications, is the only body through which stock, shares, and the like, can be bought or sold by the public. No doubt *A.* may enter into a contract with *B.* to sell shares to him without the intervention of the *Stock Exchange*, but such transactions are of very rare occurrence, nor do I remember to have met with one which has been made the subject of any decision in any Court of Law or of Equity. The invariable, or almost invariable, practice is to buy and sell through the medium of the *Stock Exchange;* and unless the shares can be so bought and sold they are not considered to be in the market. The question, then, is, what is the nature of the contract which a man enters into when he directs shares to be bought or sold through the instrumentality of the *Stock Exchange?* The answer, in my opinion, is a very plain and obvious one; he undertakes to buy and sell according to the practice and usage of the *Stock Exchange*, assuming of course such practice and usage not to be illegal. That practice and usage may, I believe, be stated to be generally to this effect: The broker instructed to buy shares enters into a contract with a jobber, who undertakes to deliver on a particular day a certain number of shares at a specified price; the jobber then buys those shares at any price he pleases from another broker, who is instructed to sell shares, and this other broker contracts to deliver these on the day specified; when the day arrives the names of the seller and purchaser are exchanged, an instrument of transfer is presented to the person who instructed the broker to sell, he, executes the transfer to the person who instructed the broker to buy, who accepts the shares, and thereupon the transaction, as between the seller and the buyer, is complete. While it is in progress the broker is liable to the seller to pay him the price at which the shares were sold to the jobber, the jobber is liable to pay that price to the broker, and, on the other hand, the broker instructed to buy the shares is liable to pay the jobber, and the person who instructed the broker to buy is liable to pay him the price for which he agreed to purchase the shares from the jobber; when the day arrives and the names are exchanged all the prior steps and liabilities are overlooked, and the seller of the shares

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transfers them to the buyer, and the money is paid. I can see nothing illegal or immoral in the transaction, it is the regular recognised course, it is what all persons who have recourse to the *Stock Exchange* submit to; they enter into a contract, not with a specified person, but with a person whose name is to be disclosed afterwards when the transaction is complete. It is not, as has been supposed, that the seller of shares constitutes an agent to find out and enter into a contract with, some particular buyer, or, on the other hand, that the buyer does the same as to the seller, but both parties agree to be bound by the usage of the *Stock Exchange*, which binds both parties from the beginning, but which leaves each of the parties to the eventual contract ignorant of the other till the day arrives and the instrument of transfer is executed. It was put in argument as resembling a contract by which *A.* sells to *B.*, *B.* to *C.*, *C.* to *D.*, and *D.* to *E.*, and at the request of *B.*, *C.*, and *D.*, *A.* executes the transfer to *E.*; but, in truth, this does not appear to me to put the case sufficiently high; it is, in my opinion, an engagement entered into by *A.* on one side, and *E.* on the other, that through the instrumentality of certain other persons, whoever they may be, certain shares shall be sold and bought, and they undertake to complete the contract with the person, whoever he may be, who buys on one hand and sells on the other. It is a transaction regulated by a particular practice, having reference to contracts of this description only, a practice long subsisting, recognised by Courts of Law, of which all parties are cognizant, and from which neither party can recede. It is obvious, also, that it is founded on common sense and common honesty, for it is of no sort of importance to *A.* to know to whom his shares are transferred, nor is it to *B.* to know from whence the shares come. It is a machinery by which *A.* sells to *B.*, and they are, in fact, in Law and Equity, the ultimate contracting parties; when, therefore, the transaction is complete, the necessary consequences flow from it, of which one is, that the buyer must indemnify the seller from all the consequences flowing from the ownership of the shares subsequent to the transfer.

The cases in this respect are conclusive; the point is expressly raised and decided in *Grissell* v. *Bristowe* (1), *Hawkins* v. *Maltby* (2),

(1) Law Rep. 3 C. P. 112. (2) Law Rep. 3 Ch. 188.

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and *Evans* v. *Wood* (1); and it has lately received much consideration in a case of *Sheppard* v. *Murphy* (2), in *Ireland*; in that case exactly the same question as that before me arose, it was disposed of on appeal on the 3rd of June last, and I have been furnished with the shorthand writer's notes of the decision of the Lord Chancellor and the Lord Justice of Appeal. The Defendant, through his agent, instructed a broker to buy 100 *Overend & Gurney* shares, they were sold by the Plaintiff to the Defendant in the usual manner, which I have described; the Plaintiff filed his bill for indemnity against the Defendant; their Lordships in their most able judgment, which I have read with great interest and advantage, expressly put it on the nature of the contract, according to the usage of the *Stock Exchange*, repudiating any notion of any assignment of a *chose in action*, or the like, but expressing a clear opinion, that both on principle and authority, the buyer was bound to indemnify the seller from all consequences springing from the ownership of the shares. I concur entirely in the judgment so pronounced, and I will make a decree in favour of the Plaintiff in the present case in like manner, according to the terms of the prayer of the bill. The costs must follow the event.

Solicitor for the Plaintiff: Mr. *Hodgkinson.*

Solicitors for the Defendant: Messrs. *Lewis, Munns, Nunn, & Longden.*

(1) Law Rep. 5 Eq. 9.
(2) Ir. Rep. 1 Eq. 490; on appeal, 16 W. R. 948.

HAWKINS *v.* MALTBY.

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1868

July 22.

Vendor and Purchaser—Sale of Shares—Custom of Stock Exchange—Privity—Transfer in blank—Indemnity—Payment of Calls.

The Plaintiff, a holder of forty shares in a public company, sold that number on the *Stock Exchange*, through his broker, to a jobber for £202 10*s*. The Defendant subsequently bought on the *Stock Exchange*, through a broker, 100 shares, and, in accordance with the usage, the name of the Defendant was given to the Plaintiff's broker as the purchaser of his forty shares. The Plaintiff executed and gave to his brokers a deed transferring the shares to the Defendant, the consideration being left blank. The brokers filled up the consideration with £145, which, with the sums paid by the Defendant for the other sixty shares, made up the price he had agreed to pay. This £145 was paid by the Defendant, who thereupon received the transfer and certificates of the shares. The Defendant never executed the transfer; but he kept it and the certificates in his possession and never repudiated the transaction. An order was made for winding up the company, and the Plaintiff was compelled to pay two calls, which carried interest at 11 per cent:—

Held, that there was a contract between the Plaintiff and the Defendant, entitling the former to be indemnified by the latter in respect of the calls: but that, as the Plaintiff knew that the Defendant resisted his demand, he ought to have paid the calls at once, and could only recover interest on the calls at 4 per cent. from the days on which they became due.

THE Plaintiffs in this case were entitled to forty shares, with £5 paid up, in the *Imperial Mercantile Company, Limited*, standing in the name of *Hawkins*, one of the Plaintiffs. On the 21st of March, 1866, they instructed their brokers, Messrs. *Crowley*, to sell that number of shares; and on the same day Messrs. *Crowley* sold them on the *London Stock Exchange* to one *Mackenzie*, a jobber, for £202 10*s*., for the 30th of March. The sale note sent by Messrs. *Crowley* to the Plaintiffs did not contain the name of the purchaser.

On the 26th of March the Defendant instructed his brokers, Messrs. *Wilkin*, to buy for him 100 shares in the same company, and they, on the same day, bought for him that number of shares for (including commission and stamps) the sum of £365 17*s*. Various successive sales had been made by *Mackenzie* and the purchasers from him, and on the 27th of March, in accordance with the custom, the name of the ultimate purchaser had to be disclosed to the Plaintiffs' brokers; and accordingly *Mackenzie* gave to Messrs. *Crowley* the names of the Defendant as purchaser, and Messrs.

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Wilkin as his brokers. Messrs. *Crowley* then prepared a deed of transfer to the Defendant, and sent it to the Plaintiffs, having inserted in the deed the numbers of the forty shares, but with the consideration in blank. The Plaintiff *Hawkins* executed the transfer, and returned it to Messrs. *Crowley*, who, having received from Messrs. *Wilkin* £145, with 15*s.* for stamps, filled up the amount of consideration with the sum of £145 (which, together with the sums paid for the other sixty shares, made up the price at which the Defendant had bought), and handed the transfer deed and share certificates to Messrs. *Wilkin*, who afterwards gave them to the Defendant. Messrs. *Crowley* having received £57 10*s.*, the difference between £145 and £202 10*s.*, from *Mackenzie*, on the 29th of March paid the £202 10*s.* to the Plaintiffs, after deducting commission. The transfer to the Defendant was never executed by the Defendant, or registered.

On the 26th of March a call of £5 per share was made, formal notice of which was sent by the Plaintiffs to the Defendant on the 7th of April. This call bore interest at the rate of £11 per cent., which had been fixed by the directors pursuant to the articles.

On the 11th of May the company stopped payment, and on the 26th of June it was ordered to be wound up.

On the 31st of August a call of £5 was made by the official liquidator, who gave notice that this call was also to bear interest at 11 per cent. from the day on which it was payable. The notice sent by the official liquidator was forwarded to the Defendant, but he refused to pay any part of the sums demanded. On the 6th of October the Plaintiffs paid the liquidator's call of £200, and on the 17th of December they paid the directors' call of £200 and £9 5*s.* 3*d.* for interest.

In August the Plaintiffs had filed a bill against the Defendants, which was afterwards amended; and, as amended, alleged that the Plaintiffs, through their brokers, Messrs. *Crowley*, sold the forty shares to the Defendant through his brokers, Messrs. *Wilkin*, for £202 10*s.*, the sale and purchase to be completed on the 30th of March; and that on the 28th of March the Plaintiff *Hawkins* executed a deed of transfer of the shares to the Defendant in consideration of the sum of £202 10*s.*; and it prayed that the Defendant might be decreed specifically to perform the contract so entered into by him,

and to repay the sums paid by the Plaintiffs in respect of calls, with interest at 11 per cent. from the time of payment, and pay all future calls, and to cause the deed of transfer to be registered, or otherwise to indemnify the Plaintiffs.

The cause came on to be heard before the Vice-Chancellor *Wood*, who dismissed the bill with costs, on the ground that the Defendant was not aware when he bought the shares of the call made on the 26th of March (1). On appeal the Lord Chancellor held that the Defendant was not entitled to resist specific performance on this ground, but inasmuch as the contract with the Defendant was incorrectly alleged in the pleadings, he dismissed the bill with costs without prejudice to any other bill which might be filed (2).

Another bill was filed accordingly; alleging, amongst other things, that the Plaintiffs agreed to accept, and did accept, the Defendant as the purchaser and transferee from the Plaintiff *Hawkins* of the shares for the consideration money of £145; and that the Defendant agreed to accept, and did accept, the Plaintiff *Hawkins* as the vendor and transferor to him of the same shares for the consideration money of £145; that the Messrs. *Crowley* as the agents and with the authority of the Plaintiffs filled up the blank in the transfer with the proper amount of the consideration money, viz., £145, and that they delivered the transfer to Messrs. *Wilkin* as the complete deed of the Plaintiff *Hawkins*. The relief sought was in substance the same as that in the former bill.

Mr. *Townsend* (Mr. *Jessel*, Q.C., with him), for the Plaintiffs:—

On the merits the Lord Chancellor was in our favour, and the only ground on which the former bill was dismissed was the technical inaccuracy in the pleadings, which is now set right.

[The MASTER OF THE ROLLS said the only point on which he felt any doubt was the effect of the call on the 26th of March.]

The Defendant had full notice of the call on the 7th of April, and he never made any attempt to take advantage of it until after the bill was filed in August. All that he now says in the answer is, that he would have been willing to return the share certificates and the transfer to the Plaintiffs if they had applied for them:

(1) Law Rep. 4 Eq. 572. (2) Law Rep. 3 Ch. 188.

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but that is nothing to the purpose. The Court requires a person in such circumstances to take active steps in repudiating his bargain, and will not allow him to play fast and loose: *Prendergast* v. *Turton* (1); *Clegg* v. *Edmondson* (2); *Shepherd* v. *Gillespie* (3).

Mr. *Southgate*, Q.C., and Mr. *Bush*, for the Defendants:—

So far as the case is governed by *Hodgkinson* v. *Kelly* (4), we do not propose to take any objections, reserving our right to raise any of the points so governed upon appeal; but in some respects the case is different. The transfer has never been executed by the Defendant. Again, it was executed by the Plaintiff in blank: it is therefore invalid as a legal transfer of the shares: nor can it be used as evidence of a contract, because it is quite clear that the Plaintiffs never authorized their brokers to fill up the blank with £145, a sum of which they knew nothing when they executed the transfer, nor, indeed, until after the former bill was filed. As to it being incumbent on the Defendant to repudiate the shares, it was no less incumbent on the Plaintiffs to ask them back.

Lord Romilly, M.R.:—

I think I am bound by the decisions. I agree with the Vice-Chancellor (now Lord Justice) *Wood* that there is a contract between these parties. I do not think that the fact of the consideration being in blank altered it. I agree with the Lord Chancellor that the objection as to the call was waived by the Defendant. Not only did he know the shares were sold subject to the possibility of a call being made, but knowing in April that a call was actually made, he says nothing and does nothing until the bill is filed, which is in the August following—that is to say, four months afterwards. He takes no step to repudiate the transaction, and all he says now is, that he was willing to give up the transfers and certificates if he had been applied to for that purpose, which is, no doubt, true; but that is different from saying that he repudiated the shares. I think, therefore, that there must be a decree in favour of the Plaintiffs according to the prayer of the bill.

Mr. *Southgate*:—The bill asks for interest at 11 per cent.

(1) 1 Y. & C. Ch. 98.
(2) 8 D. M. & G. 787.
(3) Law Rep. 5 Eq. 293; 3 Ch. 764.
(4) *Ante*, p. 496.

Mr. *Townsend*:—We were compelled to pay that to the official liquidator, and we gave the Defendant notice of the calls being due, and that that rate of interest would be payable.

LORD ROMILLY, M.R.:—

The Plaintiffs knew that their demand was resisted by the Defendant, and that a suit would be necessary to enforce it, and they should have paid the calls at once. I can only allow them interest at 4 per cent. from the time when the calls became due.

Solicitors for the Plaintiffs: Messrs. *Hurford & Taylor*.
Solicitor for the Defendant: Mr. *James Crowdy*.

In re BARNED'S BANKING COMPANY.

HELBERT'S CASE.

Company—Contributory—Past Member—Companies Act, 1862, *s.* 38.

Under the 38th section of the *Companies Act*, 1862, a past member of a company which is being wound up is liable to contribute in respect of debts and liabilities contracted before he became a member.

THIS was an application by the official liquidators of *Barned's Banking Company, Limited*, that a call of £35 per share might be made upon the executors of *Lionel Helbert*, a past member of the company, in respect of 675 shares held by him.

The company was registered in June, 1865, and was ordered to be wound up on the 8th of May, 1866, upon a Petition presented on the 27th of April, 1866. The capital was £2,000,000, in 40,000 shares of £50 each, on which £10 per share was paid before the winding-up. *Helbert* was registered as the holder of 650 shares in December, 1865, and of 25 more shares in February, 1866. On the 20th of March, 1866, the 675 shares were transferred to *Charles Mozley*, and at the commencement of the winding-up *Mozley* was the registered holder of the shares. The certified debts of the company amounted to nearly £2,000,000, of which upwards of £500,000 were incurred before the 20th of March, 1866. A call

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of £40 per share (the whole amount unpaid) had been made upon all the present members of the company, which produced £355,000, and a dividend of 4*s.* in the pound had been paid to the creditors. The liquidators estimated that the call would produce only £85,000 more, and that the unrealized assets would produce about £130,000. The estate of *Mozley*, who held 4347 shares, was being wound up under an inspectorship deed, and had paid nothing in respect of the £40 call, and the inspectors stated that it was not likely to pay more than 2*s.* 6*d.* in the pound. By an order of the Master of the Rolls (1), affirmed by Lord Justice *Rolt* (2), the list of contributories of Class B., consisting of past members, was settled, and *Helbert's* executors had been placed on the list in their representative character.

Mr. *Baggallay*, Q.C., and Mr. *Kekewich*, for the official liquidators:—

The unpaid debts of the company amount to nearly £1,600,000, and exceed the amount of the unpaid capital and the unrealized assets of the company. It is clear from the estimate of the liquidators that the present members are unable to satisfy the contributions required to be made by them; and *Mozley*, the present holder of the shares formerly held by *Helbert*, cannot pay more than £5 per share. The whole amount of the share is required, and *Helbert's* estate must pay the remaining £35 per share.

Mr. *Southgate*, Q.C., and Mr. *Bardswell*, appeared to support the application for persons who had been appointed to represent the creditors; but as the order appointing the creditors' representatives was not produced, the Court declined to hear them.

Mr. *Jessel*, Q.C., and Mr. *Locock Webb*, for *Helbert's* executors:—

First: the liability of a past member is limited to the claims of those creditors who gave credit to the company on the faith of his being a member, that is to say, to debts and liabilities incurred while he was a member; and until it is proved that any of the existing debts and liabilities of this company were incurred while *Helbert* was a member, no call can be made upon his executors.

(1) Law Rep. 4 Eq. 458. (2) Law Rep. 3 Ch. 161.

In the case of a partnership, a new partner, whether he takes the place of a retiring partner or not, is not liable for the debts of the old firm, unless he enters into a new contract with the creditors of the old firm; and the Joint Stock Companies Acts, though they limit the liabilities of members of companies, were not meant to impose new liabilities. The judgment of the House of Lords in *Oakes* v. *Turquand* (1) was based upon the principle that joint stock companies are only modified partnerships, that credit is given to the individual members, and that the Acts have not changed the principles which govern the right of the creditor and the liability of the shareholder. The *Companies Act*, 1862, so far breaks in upon the law of partnership, that it makes present members of the company liable for all its debts; but that does not apply to past members. The 38th section was intended to restrict, not to enlarge, the liability of past members; and, accordingly, in *Andrew's Case* (2) Lord Justice *Rolt* says, it would be open to any person who was about to be placed on the list of contributories as a past member to shew, amongst other things, that "no debt then existed which had been contracted while he was a member." In the first part of the 38th section, "the debts and liabilities of the company" must be taken to mean the "debts and liabilities for which they are legally liable."

Secondly: there is not sufficient evidence that the present members are unable to pay their calls; the official liquidators merely state their belief that it will be so, but there is no evidence that they have taken proper steps to enforce the payment of the calls.

Thirdly: The assets of the company ought to be realized before a call is made upon past members.

LORD ROMILLY, M.R.:—

I entertain no doubt about this matter. A long and laboured argument has been addressed to me for the purpose of repealing two or three lines of an Act of Parliament, which is as clear as can be. There is at the beginning of the 38th section of the *Companies Act*, 1862, a direction that "every past and present member shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities"—that is, *all* the debts and liabilities—"of the company, and the costs,

(1) Law Rep. 2 H. L. 325. (2) Law Rep. 3 Ch. 161, 165.

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charges, and expenses of the winding-up, and the payment of such sums as may be required for the adjustment of rights amongst the contributories themselves." It is a very comprehensive clause; under which past members are liable to pay everything *pari passu* with the present members. Then the subsequent *placita* of the clause point out where the liability is limited, and the case of debts contracted before the contributory became a member does not come within any of them. Therefore the case is plain. It is said that there is no evidence about various matters which are stated and relied upon by the official liquidator: this may be so; but I have sufficient evidence before me to satisfy me that when every shilling is called up from all the past members, as well as all the present members, the creditors will not nearly be paid in full. Therefore I am clear that this call must be made.

Solicitors for the Applicants: Messrs. *Freshfields.*

Solicitors for the Respondents: Messrs. *Elmslie, Forsyth, & Sedgwick;* Messrs. *Cunliffe & Beaumont.*

M R. 1868 *July* 16.

In re ALEXANDRA PARK COMPANY.

HART'S CASE.

Company—Contributory—Rectification of Register—Infant—Delay.

4 Ch. 33.

An infant shareholder in a company attained her majority six months after the commencement of the winding up of the company, and was, after due notice, settled on the list of contributories. More than a year after the filing of the certificate of the settlement of the list, and nearly three years after she attained her majority, she applied to have her name removed from the list:—

Held, that she was not precluded by delay.

THIS was an application by *Eliza Hart* to have her name removed from the list of contributories of the *Alexandra Park Company, Limited.*

The company was ordered to be wound up in February, 1865; and at that time the applicant, then an infant, was the registered holder of five shares. In June, 1865, she was served by the official liquidator with notice of his intention to place her name on the list

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of contributories. On the 7th of August, 1865, she attained her majority. In March, 1867, the certificate of the settlement of the list of contributories was filed, which certified that the name of the applicant had been included in the list on the 5th of July, 1865. On the 1st of January, 1868, the applicant was served with a summons for a call, on the 11th of February with an order for a call, and on the 31st of March with a summons for a balance order. On the 16th of April she appeared to oppose the balance order, which was made against her on that day. On the 1st of June she took out the present summons.

Mr. *North*, for the applicant:—

The applicant is clearly entitled to have her name removed, unless she is precluded by delay. In *Shrapnell's Case*, cited in *Lindley* on Partnership (1), a shareholder who attained his majority before the winding-up, and was made a contributory after due notice, was afterwards removed from the list. The fact of a person allowing his name to remain on the list of contributories for a length of time does not raise an equity against him to have it kept there, if no loss has been thereby occasioned to the company: *Shewell's Case* (2).

Mr. *Baggallay*, Q.C., and Mr. *Baldwin Smith*, for the official liquidator:—

An infant shareholder must repudiate the contract to take shares within a reasonable time after attaining majority: *Dublin and Wicklow Railway Company* v. *Black* (3). The applicant, with full notice that she had been or would be settled on the list, has waited for nearly three years; and if the result of the winding-up had been to leave a surplus of assets divisible among the shareholders, she would, no doubt, have elected to retain her shares. Under these circumstances she must be taken to have exercised her option not to avoid the contract.

Lord Romilly, M.R.:—

I think *Shewell's Case* (4) is conclusive upon this matter. The applicant was not certified to be a contributory until March, 1867,

(1) 2nd Ed. vol. ii. p. 1311.
(2) Law Rep. 2 Ch. 387.
(3) 8 Ex 181.
(4) Law Rep. 2 Ch. 387.

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and she does not appear to have had notice of that until January, 1868. She took no steps in the matter until the 16th of April, when she instructed her solicitor to appear and oppose the making of a balance order. In that state of things I cannot hold that she has waived her right to have her name removed, and accordingly it must be removed. I cannot give her any costs. The official liquidator will have his costs out of the estate.

Solicitor for the Applicant: Mr. *Jennings.*

Solicitors for the Official Liquidator: Messrs. *Bailey, Shaw, Smith, & Bailey.*

M. R. 1868 *July* 21, 22.

In re NEW CLYDACH SHEET AND BAR IRON COMPANY.

Company—Debenture—Winding-up—Assignment of all Real and Personal Estate of Company.

5 Ch 321
2 Ch D. 339
12 Ch D. 299

A debenture purporting to be an assignment of the undertaking, and all the real and personal estate of the company, to secure the repayment of a sum of money at a future date:—

Held, to create a valid charge on all personal estate of the company existing at the date of the debenture, but not on subsequently-acquired personal estate.

THIS was a summons to obtain the opinion of the Court as to what portion of the personal estate of the *New Clydach Sheet and Bar Iron Company, Limited*, was comprised in certain debentures issued by the company.

By the 9th clause of the articles of association the board of directors might, with the sanction of a general meeting, borrow on mortgage of the property of the company, or on bonds or debentures, any sum not exceeding one-third of the subscribed capital; and by the 10th clause the board might, without the sanction of a general meeting, borrow from the bankers of the company, or on mortgage of the property of the company, or on bonds or debentures, any sum not exceeding £5000.

Previously to July, 1865, the directors, with the sanction of a general meeting of the company, issued debentures to the amount of £6000.

In August, 1865, the directors, under the 10th clause, issued debentures to the amount of £2300.

The debentures purported to be assignments by the company of "the undertaking, and all the real and personal estate" of the company, by way of mortgage, to secure the repayment of the sums therein respectively mentioned: and these sums were to remain on the security of the debentures for three years after the dates thereof respectively. None of the debentures contained any express provision that the debenture holders should be entitled to be repaid *pari passu.*

In 1867 the company was ordered to be wound up. In the course of the liquidation the chattels and personal estate of the company had been sold, and the question arose whether the debenture holders were entitled to any and what part of the produce of such sale.

Some of the chattels thus sold were in existence at the times when the debentures were issued; others were subsequently acquired in the ordinary course of trade; others were implements of trade, which had been substituted for similar implements worn out by use.

Mr. *Jessel,* Q.C., and Mr. *Wickens,* for the debenture holders, contended that the debentures comprised the whole estate of the company at whatever time it was acquired: *In re Marine Mansions Company* (1); or, at all events, that they comprised all chattels substituted for others in the ordinary course of trade.

LORD ROMILLY, M.R.:—

The language in the case of the *Marine Mansions Company* was very strong: it expressly extended to future property. I do not think that that case has much to do with the present. My opinion is, that the stock-in-trade, and chattels necessary for carrying on the business which were acquired subsequently to the date of the debentures, did not pass.

Mr. *Baggallay,* Q.C., and Mr. *Charles Hall,* for the official liquidator:—

The debentures are merely mortgages of the undertaking; that

(1) Law Rep. 4 Eq. 601.

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is to say, of the profits arising from the working of the undertaking. The use of the plant may be necessary for creating the income which is to be derived from the undertaking, and therefore the personal estate is properly included in the mortgage; but when the undertaking ceases to be a going concern, the debenture ceases to affect the property of the company: *Gardner* v. *London, Chatham, and Dover Railway Company* (1). Consequently the debenture holders are not entitled to any portion of the proceeds of sale.

Lord Romilly, M.R.:—

I think that I must hold that the debentures passed all personal property in existence at their respective dates. But it appears that they are not all of the same date, and that may give rise to questions of importance. Assume that one set of debentures was issued in May, and a second set in August; then the May debenture holders would have a charge upon all the stock-in-trade and all the chattels of the company which existed in May at the date of the debentures, and the subsequent debenture holders would have all which existed in August. If there was so considerable a change between May and August as to render it necessary, I think the debenture holders of May would be entitled to satisfy themselves out of all the property existing in May, so far as it will extend, but must give the debenture holders of August all that was acquired subsequently. I think the matter had better go back to Chambers with an expression of my opinion to this effect, and it can then be worked out there.

Solicitors for all Parties: Messrs. *Gregory, Rowcliffes, & Rawle.*

(1) Law Rep. 2 Ch. 201.

In re COMMERCIAL BANK OF INDIA.

M. R.
1868
July 25.

Company—Winding-up—Jurisdiction—Foreign Company.

A joint stock company formed in *India*, and incorporated by registration under Indian law, and having its principal place of business in *India*, with an agent and a branch office in *England*, may be wound up under the *Companies Act*, 1862.

THE *Commercial Bank of India* was an unlimited joint stock company established at *Bombay* in 1845 under a deed of settlement for the purpose of carrying on the business of banking in all parts of the world. Its head office was at *Bombay*, and it had a branch office in *London* under an agent or manager. Its assets consisted principally of deposits, bills, and negotiable securities, partly in *India*, partly in *China*, partly in *London*, and partly in *America*. In 1860 it was registered in *India* under Act 19 of 1857 of the Legislative Council of *India*, and a resolution was passed in conformity with that Act by which it became in *India* a corporate body. In 1863 a new company was formed for the purpose of taking over the business of the old company, three-fourths of the shares being taken by the shareholders in the old company, and the remaining fourth allotted to other persons. In 1864 the new company was incorporated by royal charter as a limited company, under the name of the *Commercial Bank Corporation of India and the East*. On the 1st of January, 1865, the whole of the assets of the old company were taken over by the new company, which thenceforth carried on the business of the old company at the same offices, and with the same managers and agents, until May, 1866, when it was ordered to be wound up by the Court of Chancery under the *Companies Act*, 1862. On the 5th of January, 1865, the old company passed resolutions for its voluntary winding up under the provisions of Act 19 of 1857 of the Legislative Council of *India*, and appointed liquidators, but no further steps were taken to wind it up. It was intended that the whole of the liabilities of the old company should be taken over by the new company, and accordingly all

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the creditors of the old company brought in their claims in the winding up of the new company, which were at first admitted by the liquidator, and certified, and a dividend was paid upon them; but subsequently, upon a motion by a contributory of the new company, the debt of *Felix Jones*, a deposit creditor of the old company, was expunged, and he was ordered to refund the dividend, on the ground that he had not agreed to accept the new company as his debtor in discharge of the old company. Similar motions were pending to expunge the debts of other creditors of the old company.

This was a Petition by *Jones* for the winding up of the old company. The Petition had been served by the direction of the Court upon the last chairman of the old company, who was now resident in *England*, upon the last *London* agent of the old company, and upon the new company and its official liquidator.

Mr. *Southgate*, Q.C., Mr. *Bristowe*, and Mr. *Lindley*, for the Petitioner:—

In consequence of the decision that the Petitioner is not a creditor of the new company, he and those who are in the same position must proceed to recover their debts from the old company, and as the whole of the assets of the old company are in the hands of the new company, and the claims of the two companies *inter se* will have to be adjusted, it is most expedient that the old company should be wound up here. The only question is, as to the jurisdiction of the Court under the *Companies Act*, 1862. The words "any partnership, association, or company" in the 199th section are wide enough to include such a company as this. A foreign company, having an agent and office in *England*, is amenable to the jurisdiction of the Courts of this country, and could have been made bankrupt under the 7 & 8 Vict. c. 111. In *In re Union Bank of Calcutta* (1) Vice-Chancellor *Knight Bruce* assumed, without deciding the question, that such a company could be wound up under the 11 & 12 Vict. c. 45, but refused to make the order, on the ground of its inexpediency, which does not apply to this case.

(1) 3 De G. & Sm. 253.

Mr. *Baggallay*, Q.C., and Mr. *Kekewich*, for the official liquidator of the new company, did not oppose the Petition.

The other Respondents did not appear.

LORD ROMILLY, M.R.:—

I think that I have jurisdiction to make the order; if the company is not wound up here, these persons will not be able to get their money.

Solicitors for the Petitioner: Messrs. *Janson, Cobb, & Pearson.*
Solicitors for the Respondents: Messrs. *Freshfields.*

In re MARLBOROUGH CLUB COMPANY. *Ex parte* PERCIVAL.

Company—Winding-up—Costs payable out of Estate—Priority.

Where in the course of winding up a company orders have been made for the payment of costs out of the estate, the Petitioners in the winding-up are alone entitled to priority.

14 Eq 280
14 CLD 169
23 CLD 571
574-9

THE *Marlborough Club Company, Limited*, was ordered to be wound up by the Court, and the persons who presented the Petition were to have their costs out of the estate.

An application was afterwards made to the Court by the official liquidator, that certain holders of fully paid-up shares, of whom Mr. *Percival* was one, should be placed on the list of contributories. The application was refused with costs (1).

The official liquidator had got in certain assets of the company, and had in his hands funds more than sufficient to pay the costs of the Petitioners in the winding-up; and Mr. *Percival* now applied for payment of his costs next after them.

Mr. *Marten*, in support of the summons:—

The first persons to be paid their costs are the Petitioners; and we are next. The priority of payment is determined by the date

(1) Law Rep. 5 Eq. 365.

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of the order directing it; and the assets ought to be applied accordingly: *Ex parte Smith* (1). It would be highly unjust that we should be compelled to wait until all the assets are got in, and then obtain, perhaps, only a dividend.

Mr. *Cracknall*, for the official liquidator, was not called upon.

Lord Romilly, M.R.:—

This seems to me a mistaken application altogether. I always direct the Petitioners to be paid their costs first; but there is no priority in respect of costs subsequently ordered to be paid. I simply order the costs to be paid if the assets are sufficient, and about that I know nothing in this case. Besides, how can I give any priority when there may be other persons entitled to costs who are not here? However, I shall not finally dispose of the matter until I have seen the Chief Clerk.

July 25. Lord Romilly, M.R.:—

I dismiss this summons with costs. I find that the official liquidator has received nothing in respect of his costs or services. It is not my intention to give persons to whom I may award costs priority over other persons who are also entitled to costs simply because one order bears an earlier date than another.

Solicitors: Messrs. *Mason, Sturt, & Mason;* Mr. *Turnley.*

(1) Law Rep. 3 Ch. 125.

THOMAS *v.* NOKES.

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Practice—Cons. Ord. XXIII. Rule 10—*Order to do an Act "forthwith."*

An order of the Court for the delivering up of a deed "forthwith" is a sufficient expression of time within the meaning of Cons. Ord. XXIII. rule 10.

THIS was an application that the Clerks of Records and Writs might be directed to issue an attachment against the Defendant for disobeying an order of the Court, whereby he was ordered to deliver up a certain lease therein mentioned to the Plaintiff "forthwith."

A difficulty was felt in the office on the ground that the word "forthwith" did not sufficiently specify the time within which the act referred to in the order should be done, having regard to Cons. Ord. XXIII., rule 10, which requires that every decree or order in a suit requiring any person to do an act thereby ordered "shall state the time within which the act is to be done."

Mr. *Southgate*, Q.C., Mr. *Jessel*, Q.C., Mr. *Terrell*, and Mr. *Cottrell*, appeared in the case.

Mr. *Murray*, of the Record and Writ Clerks' Office, referred the Master of the Rolls to a similar case of *Backhouse* v. *Paddon*, in which Lord Justice *Wood*, when Vacation Judge, in October, 1865, ordered an attachment to issue.

LORD ROMILLY, M.R., held that the word "forthwith" was a sufficient expression of the time within which the act was required to be done within the meaning of the 10th rule of Cons. Ord. XXIII., and made the order accordingly.

Solicitors: Messrs. *Thomas & Son*: Messrs. *Nokes, Carlisle, & Francis.*

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ALLEN *v.* BONNETT.

Practice—Consolidated Order XIX. Rule 4—Depositions in Bankruptcy.

An order will not be made under Consolidated Order XIX., r. 4, to read depositions in bankruptcy at the hearing.

Lake v. *Peisley* (1) overruled.

THIS was a suit by assignees of a bankrupt for the purpose of setting aside a mortgage made by the bankrupt. An application made to the Secretary of the Master of the Rolls for an order to read at the hearing certain depositions made in the Bankruptcy Court was refused.

Mr. *Chute* now mentioned the matter to the Court, and referred to *Lake* v. *Peisley* (1), where a similar order was made.

The MASTER OF THE ROLLS at first made the order; but afterwards stopped it, upon his attention being called by the Secretary to the decision in *Stephenson* v. *Biney* (2).

Solicitors: Messrs. *Prall & Nickinson.*

(1) Law Rep. 1 Eq. 173, 35 Beav 125. 11 Jur N S 1012 (2) Law Rep. 2 Eq. 303. 12 Jur N S. 428,

Subsequently the depositions were read offered without leave to be read without an order & though objected to were permitted to be read, on the ground semble that they had by reference been made pt of the answer. S C 18 W R 874 16 L T

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April 29;
May 4, 5;
July 15.

HOLLOWAY *v.* WEBBER.
HOLLOWAY *v.* HOLLOWAY.

Will—Vested Interest—Tenant in Tail—Personalty.

A testator devised and bequeathed his real and personal estates to trustees, and directed them, after converting and making certain payments out of his personal estate, to invest the surplus and the annual proceeds of his real and personal estates during the time that any person beneficially interested in these estates should be under twenty-one, in order to accumulate the personal estate. He then directed that, after the payment of certain legacies, the trustees should hold all his real and personal estates for his grandson, the first or eldest son then living of his daughter *C.*, during his life, and after his decease, for his first and other sons in tail, with remainders over in favour of *C.*'s other children. The will contained a proviso that such person as should be entitled to an estate tail in possession in the real estate should not be absolutely entitled to the leasehold and personal estates until he should attain twenty-one; that the leasehold and personal estates should absolutely belong only to such person as should first attain the age of twenty-one, and become entitled to an estate tail in possession in the real estate, and that in the meantime the leasehold and personal estates should remain subject to the trusts declared.

Lord *Eldon*, in *Marshall* v. *Holloway* (1), declared that the direction to accumulate was void for remoteness. At that time *C.* had several children. *H.*, the eldest son and tenant for life, was under the decree entitled to, and had been in possession of, the rents and profits of the real and leasehold, and the proceeds of the personal estates, and he was still alive. His eldest son, *C. B.*, died in 1863 under twenty-one, leaving two brothers surviving, the elder of whom, *H. E.*, had since attained twenty-one:—

Held, that *H. E.*, who was in possession of the first estate of inheritance, and had attained twenty-one, was, subject to his father's life interest, absolutely entitled to the leasehold and personal estates.

THESE causes now came on to be heard together upon a motion for a decree.

Thomas Holloway, by his will, dated the 2nd of September, 1813, after bequeathing certain legacies, devised and bequeathed unto three trustees all his real and leasehold and other personal estate, upon trust to convert, where necessary, his personal estate, and after payment of debts and legacies to invest the surplus as directed, and in like manner to invest the dividends, interest, and annual proceeds of all his personal estate, and also the rents and

(1) 2 Sw. 432.

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profits of his real estate from time to time, as and when, and so often, and during all such times as any person or persons beneficially interested in, or entitled to, his real and personal estates under the trusts should be under the age of twenty-one years, adding all such investments to his personal estate in order to accumulate the same; and upon further trust, as and when each and every of his grandchildren who should not become entitled to his real and personal estates, or some part thereof, should attain the age of twenty-one years, to raise and pay out of his personal estate to each of such grandchildren not so entitled the sum of £1000, and, subject to the trusts thereinbefore declared as to, for, and concerning all his freehold, copyhold, and leasehold, and real and personal estates, the trustees were to stand seised and possessed thereof upon trust for his grandson, the first or eldest son then living of his daughter *Catherine*, and then of the age of five years, during his life, and after his decease upon trust for the first and every other son of his body and the heirs of their bodies, and on failure of such issue upon similar trusts in favour of the second and third sons of his daughter *Catherine*, then of the ages of two years and six months respectively, for life, with remainder to their issue in tail male, and remainders over in favour of the daughters of his daughter *Catherine* successively, and then aged thirteen, twelve, and eleven years respectively, for life, and their sons successively in tail, and remainders over in favour of the sons of his daughter *Catherine* thereafter to be born successively in tail, and remainders over in favour of the daughters of his said grandsons successively as tenants in common in tail, with cross remainders in tail, with similar remainders in favour of the daughters of his said granddaughters in tail, with remainders in favour of the daughters of *Catherine* thereafter to be born, as tenants in common in tail, with cross remainders in tail, and remainders in favour of his own right heirs and next of kin respectively. The will contained this provision:—

"I declare it to be my will and meaning that such person or persons as shall, under this my will, be entitled to an estate tail in possession in my said real estate, shall not be absolutely entitled to my leasehold and personal estates until he, she, or they respectively shall attain the age of twenty-one years, and that my said

leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years, and become entitled to an estate tail in possession in my real estate under the trusts aforesaid, and in the meantime the same leasehold and personal estates shall remain subject to the trusts hereinbefore declared thereof, notwithstanding anything hereinbefore contained to the contrary."

It was provided that every person who, by virtue of the trusts, should become entitled to the possession, or to the rents and produce of his real and personal estates, should within the space of one year after attaining the age of twenty-one use the surname and quarter the arms of *Holloway*.

By codicils made in 1814 and 1815, the testator devised other estates unto the same trustees, upon the trusts of the will, and he died on the 22nd of January, 1816, leaving his widow and his daughter *Catherine*, the wife of *Horatio Martelli*, his only child and heiress-at-law, and next of kin surviving.

In 1816 a suit, *Marshall* v. *Holloway*, was instituted by the trustees, praying that the trusts might be carried into execution under the direction of the Court. That cause came on to be heard before Lord *Eldon* (1), who declared that the direction to accumulate was too remote, and void in law; that *Horatio Francis Kingsford Martelli*, the eldest son of the testator's daughter *Catherine*, was entitled in possession to the rents and profits of the freehold, copyhold, and leasehold estates, and to the annual proceeds of the personal estate during his life, with remainder to the first and other sons of his body, and the heirs of their bodies, with such remainders over as in the will contained. In pursuance of such decree, the Plaintiff in *Holloway* v. *Webber*, viz., *Horatio F. K. Martelli*, who assumed on attaining the age of twenty-one the name and arms of *Holloway*, had been in the receipt and enjoyment of the income of the real and personal estates as from the death of the testator. The Defendant *Webber* was the executor of the will of the surviving trustee, who died in 1862. The testator's widow died in June, 1831. *Catherine Martelli* died in 1818, and left eight children, six of whom, three daughters and three sons, were born previously to the date of the testator's will, and were the

(1) 2 Sw. 451.

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existing children referred to therein, one daughter born after the date of the will, but in the testator's lifetime, and one daughter born after his death. *H. F. K. Holloway*, in 1841, married, and at the date of filing his bill, in March, 1864, had had six children, viz., *Charles Breton Holloway*, who died in 1863 under twenty-one years of age, and *Horatio Edward* and *Francis*, and three daughters, who were living, and he claimed to be absolutely entitled, as legal personal representative of *C. B. Holloway*, to the leasehold and personal estates.

Charles Henry Ansley Martelli, the second son and administrator of *Catherine Martelli*, alleged that the beneficial interest in the leasehold and personal estates never vested in *C. B. Holloway*, but resulted, subject to the Plaintiff's life interest, for the benefit of the testator's widow and next of kin; secondly, the children living of the children of *Catherine Martelli* born previously to the date of the will, and the children of *Catherine Martelli* born after the date of the will, alleged that such beneficial interests were intended by the will to vest in the person who, under the will, should be tenant in tail in possession by purchase of the real estate, and should attain the age of twenty-one years, and that it remained to be determined by the event who would ultimately become entitled to the leasehold and personal estates. The Plaintiff, *H. F. K. Holloway*, prayed that the rights of all parties interested in the leasehold and personal estates might be declared; for consequential relief; and that the suit might be taken to be supplemental to *Marshall* v. *Holloway*.

In February, 1868, *Horatio Edward Holloway*, above mentioned, who had attained twenty-one, filed his bill, and alleged that, the beneficial interest in the leasehold and personal estates had, in the events which had happened, vested absolutely in him subject to his father's life interest, and that he and his father were absolutely entitled to such estates; but that *Charles Henry Ansley Martelli*, as administrator of his mother, objected to any assignment by the trustees, on the ground above-mentioned, and that these estates passed under his mother's will to his brothers and sisters absolutely. He also alleged that the decree of 1820 was only consistent with the will containing a valid disposition of the whole of the personal estate, and that so long as that de-

cree remained unaltered the Court could not decide that the will was invalid as to the leasehold and personal estates; and that after this great lapse of time the parties who objected to the decree were not entitled to have it reheard or altered, or if they were, they ought first to repay certain moneys which had been advanced to them by *H. F. K. Holloway* on the assumption that the bequest of these estates was in all respects valid, and he prayed for a declaration that he and *H. F. K. Holloway* were alone entitled to these estates; for consequential relief; that the suit might come on for hearing with *Holloway* v. *Webber*, and be taken to be supplemental to *Marshall* v. *Holloway*.

The question now argued was, who was entitled to these leasehold and personal estates.

Sir *Roundell Palmer*, Q.C., and Mr. *Waley*, for *H. E. Holloway*:—

The first question is, whether the limitations of the leasehold and personal estates are or are not void for remoteness. If not void, or if the consideration of this ground of objection be now excluded, then, secondly, whether these estates have become vested in *H. E. Holloway*, the tenant in tail in remainder of the real estate, who has attained the age of twenty-one. As to the first question, it really does not arise, for these are good limitations; the trusts are not on this ground void, and so far *H. E. Holloway*, the second son, will be entitled absolutely upon the death of his father.

The decision of the second question, which is much more difficult, must be governed by the case of *Gosling* v. *Gosling* (1), and on appeal, as *Christie* v. *Gosling* (2), of *Harrington* v. *Harrington* (3), and of *In re Johnson's Trusts* (4).

In *Gosling* v. *Gosling*, however, the personalty was not in terms settled, except by reference to the realty, but that is not so here. The question does not arise in the same form, because here all the property is settled together. The question in that case was decided one way by Lord *Romilly* (5), and in another by Lord *Westbury* (6). However, if the trusts in favour of *H. F. K. Holloway* for life, with remainder to his first and other sons, stood alone, they might, as

(1) 1 D. J. & S. 1.
(2) Law Rep. 1 H. L. 279, 291-292.
(3) Ibid. 3 Ch. 564.
(4) Law Rep. 2 Eq. 716-729.
(5) 32 Beav. 58, 64.
(6) 1 D. J. & S. 15.

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tending to create too remote a gift, confer on the first tenant in tail of the realty *in esse* an absolute vested interest in the personalty, and then the claim of *H. F. K. Holloway*, as the legal personal representative of his deceased eldest son, might be successful. That contention can prevail only on the assumption that the tenants in tail under the will take the real estate by descent; but the proviso disposes of that contention, for it shews that those who are to take an absolute interest in the personalty are those who take the realty by purchase. The words of the proviso are "shall not be absolutely entitled to my leasehold and personal estates," till the age of twenty-one. This assumes that tenants in tail might in the meantime be "entitled," but not absolutely, to the personalty—that they might be beneficially interested. No tenant in tail by descent, and this includes all who may take the realty under the trusts, other than the first actual taker by purchase, can ever as such be entitled to the personalty. Both on the ground of intention, apparent upon the will, and on the rules of law, the tenant in tail of the realty by purchase is to have a vested interest in the personalty, for the proviso states that this property shall absolutely belong only to the person who shall attain twenty-one, and *C. B. Holloway* did not attain that age; but *H. E. Holloway*, who has attained it, is now the tenant in tail of the realty by purchase, and has the personalty clearly vested in him. It may be said that as the words "estate tail in possession" occur in the proviso, and that as *H. F. K. Holloway* is the actual tenant in possession, the whole of the conditions under which *H. E. Holloway* takes have not been complied with. But these words are not a condition precedent to the vesting of this property; they are governed by the word "entitled." They do not mean, nor were they intended by the testator to express, the actual receipt of the rents and profits of the realty. It is sufficient if the tenant in tail has attained twenty-one; if he has he will have a right to them immediately on his father's death: *Foley* v. *Burnell* (1). The law, doubtless, always favours the certain vesting of property at the earliest possible moment, but here it is a question of intention, and upon the whole will there is a clear intention that the tenant in tail by purchase of the realty, whether in possession or not, who has first attained the age of

(1) 1 Bro. C. C. 274-283.

twenty-one, and he is *H. E. Holloway*, is to have the personalty absolutely, subject only to the life interest of *H. F. K. Holloway*.

Mr. *Bacon*, Q.C., and Mr. *W. F. Robinson*, for *H. F. K. Holloway*, did not advance any argument against the contention on behalf of *H. E. Holloway*. They assumed that the decision of Lord *Eldon* had settled the question, but if the Court should, on the construction of the will, be against them on that point, they claimed a right to go into a question of recouping.

Mr. *Grenside*, for the Defendants *Webber* and *Johnson*, trustees, took no part in the arguments.

Mr. *Lewin*, for *Charles F. Martelli*, the eldest surviving son of the second tenant for life in remainder:—

The question to be decided is unprejudiced by any decision in *Marshall* v. *Holloway*, and *Foley* v. *Burnell* (1), is distinct from this case, there being in this proviso a gift. Further, as *H. E. Holloway* is not in possession, but tenant in tail in remainder, these estates do not absolutely belong to him. A question may arise on behalf of the next of kin of the testator and of his daughter *Catherine*, and it may be contended that these limitations of chattels are absolutely void, and that the proviso must be taken altogether, and not divided into branches, so as to bring the case within those of Lord *Dungannon* v. *Smith* (2), and *Ibbetson* v. *Ibbetson* (3). This case, however, is distinguishable from those cases, for this proviso contains two alternatives—the person entitled must be tenant in tail in possession, and he must have attained twenty-one, and as *H. F. K. Holloway* is alive there can be no vesting of the personalty till his death. The case of *Gosling* v. *Gosling* (4), has not much to do with this case, but that of *Harrington* v. *Harrington* (5), is very similar. In that case the events contemplated had occurred; in this case they have not. It would, therefore, be premature to decide at present who is entitled to the personalty.

[*Boydell* v. *Golightly* (6) was also cited.]

(1) 1 Bro. C. C. 274-283.
(2) 12 Cl. & F. 546.
(3) 10 Sim. 495; 5 My. & Cr. 26.
(4) 1 D. J. & S. 1.
(5) Law Rep. 3 Ch. 561.
(6) 14 Sim. 327.

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Mr. *Wickens*, for four Defendants, children of *H. F. K. Holloway*, contended that the testator had imposed a restriction upon the personal estate by the aptest words he could use, and as he had clearly expressed a perfectly lawful intention that a tenant in tail in possession only should have his personalty, the result must be in this case as in that of *Potts* v. *Potts* (1), and that as *H. E. Holloway*, though he had attained twenty-one, was not in possession of the realty, he had not acquired an absolute interest in the personalty.

Mr. *Jessel*, Q.C., and Mr. *C. Hall*, for *C. H. A. Martelli*, and four other Defendants, who claimed as under an intestacy:—

The limitations after the life estate are wholly bad; they are void for remoteness. The father of *H. E. Holloway* had, as administrator of his eldest son, who died, formerly claimed to be entitled to the personalty upon that theory. There is nothing upon the language of the will fairly open to doubt. The proviso, so called, is really a part of the limitations; the whole forms one gift, which is a qualified one, and all the conditions must be fulfilled before any donee can take. It is erroneous to say there was first a gift and that it was afterwards cut down. The question is whether there is a gift at all except clogged with certain conditions. There is here really that which Lord *Westbury*, in *Gosling* v. *Gosling*, put hypothetically. The scheme of the will is that no descendant shall take beneficially until he attains twenty-one, and in the meantime the profits are to be accumulated. Lord *Eldon* has, in fact, decided this case. As no tenant in tail can take till he attains twenty-one, that event may be protracted through centuries, and such a limitation is void as a perpetuity. It has been argued that the words "such person or persons, &c." apply to a tenant in tail by purchase, whether he be the original taker, or in the second or third degree; but the testator has said what he meant. In *Gosling* v. *Gosling* (2), the testator had not done so, and arguments were advanced to discover the meaning. It is quite plain what Lord *Eldon* meant in *Marshall* v. *Holloway* (3), and by his decree *H. E. Holloway* is bound. He only

(1) 3 J. & Lat. 353; 9 Ir. Eq. Rep. 577; S. C. 1 H. L. C. 671.
(2) 1 D. J. & S. 1.
(3) 2 Sw. 432.

declared that the infant tenant for life was entitled, and that there were remainders over, and the judgment shews that he did not declare the rights of *H. E. Holloway*, or of those in remainder—that would have been beyond the jurisdiction of this Court. If Lord *Eldon* had declared anything beyond the rights of the tenant for life, error could now be shewn in the decree. The question as to the personalty is rightly before the Court, which, though it cannot correct, is not bound to follow an erroneous decree, which cannot stand in the way of having a proper decree upon this bill: *Lechmere* v. *Braiser* (1). Lord *Eldon's* decree is prefaced by a declaration that the trusts ought to be carried into execution, and though it may not be open to the parties to impeach the validity of the trusts, yet if there be error upon the face of the decree, such a bill as this can be maintained: *Gooch* v. *Gooch* (2); *Lady Langdale* v. *Briggs* (3). Upon that case, and the authorities of *Hamilton* v. *Houghton* (4); *O'Connell* v. *M'Namara* (5); and *Stamer* v. *Nisbitt* (6), it is open upon this bill to shew that the decree was erroneous. The real question is, whether *H. E. Holloway* is entitled to the personalty, and we say that upon the construction of the whole will he is not; and further, that the decisions in the cases of *Christie* v. *Gosling* (7), and *Harrington* v. *Harrington* (8), are in our favour.

[*Lord Scarsdale* v. *Curzon* (9) was also cited.]

Sir *Roundell Palmer*, in reply, submitted that the proviso did not contain an original gift, and that to hold that would be to do violence to what was said in the will, in which there were clear words of gift. The principle was, that clear words of gift were not to be destroyed in their effect by subsequent words less clear. In *Marshall* v. *Holloway* (10), all that Lord *Eldon* decided was that the accumulation clause was void. It was true that the decree did appear to mix up the estates, but it was not so in fact. The declaration made was perfectly clear, and the Court had jurisdiction now to determine who was entitled to this personalty, and the

(1) 2 Jac. & W. 287.
(2) 3 D. M. & G. 366.
(3) Ibid. 391.
(4) 2 Bli. 193.
(5) 3 D. & War. 411.
(6) 3 J. & Lat. 447.
(7) Law Rep. 1 H. L. 279.
(8) Ibid. 3 Ch. 564.
(9) 1 J. & H. 40, 65-69.
(10) 2 Sw. 432.

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person so entitled was *H. E. Holloway*, who was tenant in tail of the realty by purchase, and who had attained the age of twenty-one years.

HOLLOWAY v. HOLLOWAY.

July 15. SIR JOHN STUART, V.C.:—

This case seems to be governed by the decision of the House of Lords in the case of *Christie* v. *Gosling* (1). The mode of construction sanctioned by the House of Lords is more easily applied in the present case, because the language of the testator appears to shew more clearly that issue in tail, or tenants in tail by inheritance, are not within the meaning of the proviso.

In both cases it is clear that the testator had in view that there was a difference in the rules of law applicable to real estate as distinguished from personal estate, and that the words which would give an estate tail in realty, would, as to personal estate, give an absolute interest.

In both cases the intention is perfectly clear. The Master of the Rolls in *Christie* v. *Gosling* admitted that his decision defeated the clear intention of the testator. It is satisfactory that Lord *Westbury* and the House of Lords found reasons sufficient for that mode of construction which did not defeat, but gave effect to the intention.

If there was nothing in the context to restrict the generality of the words "tenants in tail," and if these words include tenants in tail, whether taking by descent or by purchase, the effect unquestionably must be to make the whole void as tending to a perpetuity. But in this case the testator uses language which, on the construction of the whole proviso, shews that persons taking his estate as issue in tail—that is, tenants in tail taking by inheritance—are not within its scope. If he had said that such persons as should be entitled to an estate tail in possession by descent or inheritance of his real estate should not be absolutely entitled to his personal estate till he or she should attain the age of twenty-one, the proviso would be nonsense, because no tenant in tail, taking by descent or inheritance as tenant in tail, could ever take the personal estate. In such a case the whole proviso would

(1) Law Rep. 1 H. L. 279.

be rejected as absurd. But if he had said, that tenants in tail taking by purchase should not take an absolute interest in the personalty till twenty-one, it is clear, and it is admitted to be clear, that the proviso is good. It seems equally clear that the only tenants in tail spoken of in the proviso are those capable of taking the personal estate, and to extend the words so as to include another description of tenants in tail incapable of taking, to whom the words and scope of the proviso are wholly inapplicable, is to extend the meaning of the words beyond their obvious sense, so as to make what is otherwise sensible, nonsense, and what is otherwise valid and legal, invalid and illegal. The context therefore shews that the general meaning of the word is restricted.

What was decided in *Lord Dungannon* v. *Smith* (1) is unquestionably right. The words there admitted of no qualification, and there was nothing in the context to authorize any restricted construction of the words.

There remains another question in this cause, which is one of great difficulty. Although the Plaintiff has attained twenty-one, and is tenant in tail by purchase, it is said that he is not tenant in tail in possession, but only in remainder, inasmuch as his father, the tenant for life, is in possession of the rents and profits, and, therefore, that the Court ought not now to declare that the Plaintiff takes an absolute interest in the personal estate.

In *Christie* v. *Gosling* (2) Lord *St. Leonards* is reported to have said that he understood the words "vest absolutely" to mean a transmissible interest. Here the words "absolutely belong" must also, I think, mean a transmissible interest. The words here "shall not be absolutely entitled to my personal estate until he shall attain the age of twenty-one," certainly import that on attaining twenty-one he was to have an absolute, indefeasible, and transmissible interest. To say that the words "tenant in tail in possession" are to be so construed as to make that which was given absolutely become a defeasible interest after attaining twenty-one in case of death before coming into actual receipt of the rents and profits of the real estate seems to be a repugnancy.

The meaning of the words "in possession" ordinarily is the actual receipt of the rents and profits. Lord *Eldon*, however,

(1) 12 Cl. & F. 546. (2) Law Rep. 1 H. L. 279.

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thought that this testator did not use the word "possession" in that sense. Lord *Eldon* said in *Marshall* v. *Holloway* (1) that "under the clause declaring that tenants in tail should not be absolutely entitled, a person might, in the intention of the testator, be tenant in tail in possession without being entitled to take the rents. Again: "He has not said that they shall not be beneficially interested, but shall not be absolutely entitled." And, again: "It seems clear on the language of the proviso that although the person was under the age of twenty-one years, the testator thought him tenant in tail in possession, otherwise it is nonsense." Therefore it seems to me that there is sufficient authority for the construction which gives the Plaintiff, who is in possession of the first estate of inheritance, and has attained the age of twenty-one, an absolute and transmissible interest in the personal estate, and there must be a declaration to that effect.

One declaration in both suits, and the costs must come out of the personal estate, and, in accordance with Lord *Eldon's* decree, be as between solicitor and client.

Solicitors: Mr. *L. Wynne;* Messrs. *Field, Roscoe, Field, & Francis.*

V.-C. S. 1868 *July* 17, 20.

BEAUMONT *v.* OLIVEIRA.

Will—Charities—Real Estate in Madeira—Pure Personalty—Costs.

A bequest of pure personalty to the *Royal*, or to the *Royal Geographical*, or to the *Royal Humane Society*, is a charitable legacy.

A testator directed that all the charitable legacies bequeathed by him should be paid out of his pure personal estate, and he devised and bequeathed the residue of his real and personal estate to his executors for their own use. The only real estate was a small one in *Madeira*, which was sold under the direction of the Court. The pure personalty was insufficient:—

Held, that the proceeds of the *Madeira* estate were primarily applicable to the payment of the charity bequests; and that the pure personal estate had been exempted by the testator from any contribution towards the costs of the suit, and the funeral and testamentary expenses and debts.

BENJAMIN OLIVEIRA, who died in September, 1865, by his will in that year, after appointing the Plaintiffs the executors of

(1) 2 Sw. 445, 447, 448.

his will, and bequeathing, amongst others, a legacy to the Defendant *Oliveira* of £2000 sterling, gave and bequeathed to the treasurer for the time being of the *Royal Society* the sum of £4000. The testator, in the same terms, bequeathed legacies of the same amount to the *Royal Geographical Society*, the *Royal Humane Society*, to the *Marylebone School for Girls*, and to the *Albert Orphan Asylum*. The will contained the following direction:—"I direct all the said charitable legacies to be paid out of my pure personal estate, and as to the rest and residue of my real and personal estates, I give, devise, and bequeath the same to my executors for their own absolute use and benefit."

A suit was instituted for the administration of the testator's estate, and in taking the accounts the Chief Clerk certified that the pure personalty amounted in the aggregate to the sum of £6711 1*s.* 5*d.*; that certain leasehold property had realized the sum of £8045, and that the only real estate was a small one in the island of *Madeira*, which had been sold for £806 under the direction of the Court. The questions were, whether the above societies were charitable institutions; how the assets, including the proceeds of the estate in *Madeira*, were to be distributed; and how the costs were to be paid.

Mr. *Bacon*, Q.C., and Mr. *Langworthy*, for the Plaintiffs, after stating the facts, were stopped.

Mr. *Dickinson*, Q.C., and Mr. *A. Smith*, for the Defendants, the *Royal Geographical Society*:—

The object of the society, which is kept up by voluntary subscriptions, is to enable persons interested in geography to obtain certain information; there is no school and no teaching; and in no way can it be said that this is a charity. Scientific societies are wholly distinct from those known as charitable societies. They are more like clubs, and a gift to them is not a gift to promote charitable objects, but a gift to the societies for their own purposes, those purposes being to enable a number of persons having an interest in particular pursuits to indulge their scientific tastes. Upon the authorities, this is not a gift for the purposes of charity or education, and there is no trust, and, as the pure personalty is insufficient, this society is entitled to be paid the additional sum necessary

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out of the mixed personalty. [*Jarman* on Wills (1); *Attorney-General* v. *Haberdashers' Company* (2); *Whicker* v. *Hume* (3); *Thomson* v. *Shakespear* (4); *Carne* v. *Long* (5); and *Weld's* History of the *Royal Society*, by *Hooke* (6), were referred to.]

Mr. *Bagshawe*, for the *Royal Society*, not made Defendants, stated that this society had no endowment at all, excepting that it was allowed by the Government the use of rooms without paying any rent; and that the funds of the society consisted of those subscribed by its own members. He contended that a gift of mixed personalty to this society was not open to any objection under the 9 Geo. 2, c. 36.

Mr. *Greene*, Q.C., and Mr. *A. Bailey*, for the *Marylebone School for Girls* and the *Albert Orphan Asylum*, not parties to the suit:—

Though the *Geographical Society* receive an annual grant from Parliament upon condition of throwing open a room for the public to have access to its maps, yet as the *Attorney-General* could not file an information against the society, the grant does not create a charitable trust; and as the testator has devoted this fund to charity, it must be applied, in the first instance, in paying the charitable legacies properly so called. This is not a case of marshalling, as were the cases of the *Philanthropic Society* v. *Kemp* (7) and *Sturge* v. *Dimsdale* (8), observed upon in *Jauncey* v. *Attorney-General* (9) and *Robinson* v. *Geldard* (10), the latter of which is upon all-fours with the present case. We ask to have the full benefit of the pure personalty not specifically bequeathed, which includes, as we contend, the fixtures in the testator's house: *Johnston* v. *Swann* (11).

Mr. *Davey*, for the *Royal Humane Society*, not made Defendants:—

This society is not a charity. At any rate, its legal position has never been defined by any Court.

(1) 3rd Ed. vol. i. p. 192.
(2) 1 My. & K. 420.
(3) 7 H. L. C. 124.
(4) 1 D. F. & J. 399.
(5) 2 Ibid. 75.
(6) Vol. i. p. 37.
(7) 4 Beav. 581.
(8) 6 Ibid. 462.
(9) 3 Giff. 308-319.
(10) 3 Mac. & G. 735.
(11) 3 Madd. 457.

SIR JOHN STUART, V.C.:—

I am clearly of opinion that this society is a charity.

Mr. *Davey*:—Then as part of the property certified consists of the proceeds of sale of an estate in *Madeira*, and as there is no mortmain law in that island, and as the pure personalty is insufficient, these proceeds must go in aid of that fund, and be paid *pari passu*.

Mr. *Bagshawe* submitted that upon the authority of *Bench* v. *Biles* (1) and *Jarman* on Wills (2), the societies were entitled to the whole of these proceeds, in satisfaction of their legacies, in priority to the residuary legatees.

SIR JOHN STUART, V.C.:—

I have no doubt that these proceeds are capable of being applied to the payment of charity bequests, but will the direction in the will make these proceeds primarily liable to the payment of these legacies?

Mr. *Bacon*:—There is nothing in the will to make these proceeds primarily liable, and upon the authority of *Tempest* v. *Tempest* (3), I submit that, as they savour of realty they must be applied rateably in discharge of the debts, and the funeral and testamentary expenses, and the costs of the suit.

Mr. *Pearson*, Q.C., and Mr. *Wickens*, for a specific legatee whose legacy was ordered to be paid.

SIR JOHN STUART, V.C.:—

The first question is, whether the legacies to the *Royal* and the *Royal Geographical Societies* are legacies to institutions which can be considered as charitable, and my opinion is that they are charities. It seems to me that *Whicker* v. *Hume* (4), and the other cases referred to, have very little application to this case. Sir *J. Leach*, Sir *W. Grant*, and Lord *Eldon* have used expressions which

(1) 4 Madd. 187.
(2) 3rd Ed. vol. ii. p. 573.
(3) 7 D. M. & G. 470.
(4) 7 H. L. C. 124.

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entirely govern the present case. Sir *J. Leach*, in the case of the *Attorney-General* v. *Heelis* (1), with his usual precision, said:—"I am of opinion that funds supplied from the gift of the Crown, or from the gift of the Legislature, or from private gift, for any legal, public, or general purpose, are charitable funds to be administered by Courts of Equity."

The *Royal* and *Royal Geographical Societies* are bodies of persons who have their funds supplied from private gifts for a legal, public, or general purpose. These two societies are composed—it is the very essence of their constitutions—of individuals associated together for purposes of a public and general nature; and if any person adds to the funds of these societies, he gives it for those public and general purposes, and consequently the societies come within the definition of "charitable" given by Sir *J. Leach*. What Sir *W. Grant* and Lord *Eldon* said in the case of *Morice* v. *Bishop of Durham* (2), is entirely in accordance with the expressions of Sir *J. Leach;* and therefore I am of opinion that these two societies are, in respect of the gifts made to them by this testator, to be considered as receiving gifts which, in the contemplation of law, makes them charitable institutions.

The testator has given a direction, which leads to the next question. He directs all the charitable legacies to be paid out of his pure personal estate, and I conceive that the purpose and the language used are just as clear as in *Robinson* v. *Geldard* (3). He has manifested an intention to benefit these charitable legatees by this direction. If not, the direction would be nugatory. Therefore my opinion is that the pure personal estate is, first of all, applicable to pay these legacies before any other legacies. I go further, I think the language used manifests an intention that these legacies should be paid before any other payment out of the fund. In *Robinson* v. *Geldard* the language is very nearly the same. Lord *Truro*, who reversed the decision of Lord *Langdale*, made a decree by which he exempted the charitable legatees from any payment in respect of the suit. In *Tempest* v. *Tempest*, Lord *Cranworth* took care to say that in that case there was no intention to relieve the pure personalty from its legal liability, but I

(1) 2 S. & S. 76. (2) 10 Ves. 537.
(3) 3 Mac & G. 735.

think the direction in this will was made for the purpose of giving a preference to the charitable legatees. The words in *Tempest* v. *Tempest* (1) were:—"I direct that the charitable bequests bequeathed by this my will shall be paid in precedence of the other pecuniary legacies hereby bequeathed out of such part of my personal property not specifically bequeathed as is by law applicable for charitable purposes." There was nothing in that case to exempt the pure personalty from the ordinary contribution towards the costs of the suit, and the funeral and testamentary expenses and debts, but in this case there is a priority given to the charity legacies.

On the next question, that as to the real estate in *Madeira*, I entertain no doubt whatever that when a testator dies entitled to real estate in a foreign country, that estate is not within the peculiarity of the law of *England*, which favours heirs and devisees as against creditors; and therefore I think the proceeds of the estate in *Madeira* must go primarily to pay these charitable legacies. It may, however, be said that these proceeds are not pure personalty, and that the utmost the charities can ask for is, that they shall take their proportion with the other legatees; but my opinion is, that these proceeds are as much pure personalty as the other pure personalty, and that lands in a foreign country cannot be considered impure personal estate, nor to partake of the nature of real estate, as leaseholds do in this country. This property in *Madeira* must be considered as assets, and dealt with as the pure personalty, which is primarily applicable under this will to the payment of the charity legacies.

In all my observations I include the *Royal Humane Society*. The charities must bear their own costs of appearing to support their claims.

Solicitors: Messrs *Roy & Cartwright;* Messrs. *Boys & Tweedies;* Messrs. *Few & Co.*; Messrs. *Bailey, Shaw, Smith, & Bailey;* Messrs. *Curtis & Bedford;* Mr. *Cundy.*

(1) 7 D. M. & G. 470.

Followed. *In re* STEELE'S WILL TRUSTS. [1948] Ch. 603

Rule applied. *Re* STEELE'S WILL TRUSTS. [1948] 2 All E.R. 193.

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1868

Jan. 29;
Feb. 7, 18, 29.

23 Ch D 161

SHELLEY *v.* SHELLEY.

Will—Construction—Heir-looms—Executory Trust.

Jewels were bequeathed to testatrix's nephew, *A.*, "to go and be held as heir-looms by him and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity will permit. And I request my said nephew to do all in his power, by his will or otherwise, to give effect to this my wish as to these things so directed to go as heir-looms as aforesaid:"—

Held, that a valid executory trust was created for *A.* for life, with remainder to *B.* (*A.'s* eldest son) for his life, and upon the death of *B.* in trust for *B.'s* eldest son, to be a vested interest in him when he should attain twenty-one; but if he should die in *B.'s* lifetime, or after *B.'s* death, without having attained twenty-one, leaving an eldest son born before *B.'s* death, in trust for such last-mentioned eldest son, to be a vested interest when he should attain twenty-one. Subject to these limitations, the jewels vested in *A.* absolutely, and passed by his will.

The objection, if any, to limiting personal estate as heir-looms, where there is no real estate to guide the limitations, does not apply to the case of family jewels.

SPECIAL CASE.

Helen Parker, widow, by her will, dated the 20th of May, 1837, after certain pecuniary and specific legacies, including pecuniary legacies to the children of her nephew, *John Shelley*, proceeded as follows:—"I give my best long string of pearl earrings, bracelets with diamond snaps, and my pearl necklace and earrings, and all my rings with pearls, diamonds, and emeralds mixed, and all the rest of my pearls and emeralds," and other jewels, "to my nephew, *John Shelley*, to go and be held as heir-looms by him, and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on, to the eldest son of his descendants, as far as the rules of law or equity will permit. And I request my said nephew to do all in his power, by his will or otherwise, to give effect to this my wish as to these things so directed to go as heir-looms as aforesaid."

The testatrix appointed *John Sykes* her residuary legatee and executor.

By a codicil to her will, dated the 27th of May, 1837, the testatrix

made certain additional bequests of jewels, "as an heir-loom to go in the same manner as I have directed in my will."

The testatrix died on the 30th of May, 1838.

At the date of her will and death, her brother, Sir *Timothy Shelley*, was tenant for life of real estates in *Sussex* and *Surrey*, with remainder to the said *John Shelley* for life, with remainder to the first and other sons of *John Shelley* in tail in strict settlement.

The testatrix herself had no real estate.

John Shelley died on the 11th of November, 1866, having by his will, dated the 12th of June, 1865, given all his property, "including the jewels, jewellery, trinkets, and things bequeathed to me by the will of my aunt, *Helen Parker*," to his wife, the Defendant *Elizabeth Shelley*, absolutely.

He had five children, of whom the Plaintiff, *Edward*, the eldest son, was the only surviving one born in the lifetime of the testatrix. Two were dead without having had issue, and the other surviving children, *Charles* and *George Ernest*, were born after the death of the testatrix.

A special case had been agreed upon between *Edward Shelley* as Plaintiff, and his mother as Defendant, by which the following questions were raised:—

1. Whether, according to the true construction of the will of *Helen Parker*, the Plaintiff or the Defendant *Elizabeth Shelley*, and which of them, is absolutely entitled to the jewels so bequeathed by the will and codicil of the testatrix, and thereby directed by her to be held as heir-looms?

2. In case the Court should be of opinion that neither Plaintiff nor Defendant, *Elizabeth Shelley*, is so entitled, then that it may be declared by the decree of the Court who is entitled thereto, and whether *Elizabeth Shelley* has any and what interest in the said jewels and property, so as to entitle her to file a bill to have the same secured for her benefit?

The Plaintiff, *Edward Shelley*, claimed to be absolutely entitled to the jewels.

His mother, the Defendant *Elizabeth Shelley*, contended, on the other hand, that her deceased husband, *John Shelley*, was entitled to the jewels for his own benefit absolutely, and that by virtue of his will she had become absolutely entitled thereto.

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Mr. *W. M. James*, Q.C., Mr. *Hinde Palmer*, Q.C., and Mr. *G. Miller*, for the Plaintiff, *Edward Shelley* :—

The jewels vest in the Plaintiff absolutely, as the first person entitled to an estate of inheritance in the land, and his father, *John Shelley*, took a life interest only in them. The words which upon the authorities must be treated as words of direct gift are not controlled or cut down by the subsequent directions of the testatrix: *Lord Scarsdale* v. *Curzon* (1); *Rowland* v. *Morgan* (2); *Foley* v. *Burnell* (3); *Seale* v. *Hayne* (4); *Jarman* on Wills (5); *Ex parte Wynch* (6).

Sir *Roundell Palmer*, Q.C., and Mr. *F. V. Hawkins*, for Mrs. *Shelley*, the widow and executrix of *John Shelley* :—

Subject only to the question whether an executory trust is created, the jewels are given to *John Shelley* absolutely, as upon similar words of limitation of real estate he would have taken an estate tail: *Lewis* v. *Puxley* (7); *Robinson* v. *Robinson* (8); *Doe* d. *Burrin* v. *Charlton* (9); *Earl of Tyrone* v. *Marquis of Waterford* (10); *Jenkins* v. *Hughes* (11). If an executory trust is created, the limitations must be to *John Shelley* for life, with remainder to *Edward Shelley* for life, with remainder to the first son of *Edward Shelley* who should attain twenty-one, with a resulting interest in *John Shelley*, which is now vested in his widow by his will, subject to the contingency of *Edward Shelley* having an eldest son who shall attain twenty-one. In order to create an executory trust the words of recommendation must be imperative; the subject-matter of the recommendation must be imperative and certain, and also the objects or persons intended to have the benefit of the recommendation or wish must be certain: *Meredith* v. *Heneage* (12); *Harland* v. *Trigg* (13); *Williams* v. *Williams* (14); *Stanley* v. *Stanley* (15); *Knight* v. *Knight* (16); *Lewin* on Trusts (17). These requisites are not here complied with: the words "as far as the rules of law

(1) 1 J. & H. 40.
(2) 2 Ph. 764.
(3) 1 Bro. C. C. 274.
(4) 12 W. R. 239.
(5) Vol. ii. p. 534, *et seq.* 3rd Ed.
(6) 5 D. M. & G. 188.
(7) 16 M. & W. 73
(8) 1 Burr. 38.
(9) 1 Scott, N. R. 290.
(10) 1 D. F. & J. 613.
(11) 8 H. L. C. 571.
(12) 1 Sim. 542.
(13) 1 Bro. C. C. 142.
(14) 1 Sim. (N.S.) 358.
(15) 16 Ves. 511.
(16) 3 Beav. 148.
(17) Page 104, *et seq.*

or equity will permit," which would include the lives of every living person on earth, and twenty-one years, being far too wide, while the limitation is of a fantastic character. Again, a precatory trust must operate by virtue of the power of the testator, and not, as is here directed, by the power of the legatee, on which the testator relies. The use of the words "as far as the rules of law or equity will permit," does not extend or alter the disposition of personal estate: *Gosling* v. *Gosling* (1); *Christie* v. *Gosling* (2); *Vaughan* v. *Burslem* (3); *Countess of Lincoln* v. *Duke of Newcastle* (4). If a strict settlement is directed by the Court, it will be the first case in which the Court has gone so far, where the gift of chattels is unconnected with any limitations of real estate. They also cited *Byng* v. *Lord Strafford* (5); *Hoare* v. *Byng* (6); *Blackburn* v. *Stables* (7); *Doncaster* v. *Doncaster* (8); *Viscount Holmesdale* v. *West* (9); *Mackworth* v. *Hinxman* (10).

[The VICE-CHANCELLOR referred to *Lord Deerhurst* v. *Duke of St. Albans* (11).]

Mr. *Charles Hall*, and Mr. *A. J. Wigram*, for *Charles Shelley*, a brother of the Plaintiff.

Mr. *W. M. James*, in reply.

Feb. 18. SIR W. PAGE WOOD, V.C. (after stating the case):—

On the one side it is said that there is a clear gift to *John Shelley* for life only, though not limited in terms for life, the limitation being to *John Shelley*, "to go and be held as heir-looms by him and by his eldest son on his decease." These words under any ordinary limitation, if they stood alone, would be a gift to the first taker for life, and at his death to the next taker absolutely. But these are not the only words, as the testatrix goes on to say: "And to go and descend to the eldest son of such eldest son, and

(1) 1 D. J. & S. 1. 9 Jur. N.S. 110
(2) Law Rep. 1 H. L. 279.
(3) 3 Bro. C. C. 101.
(4) 12 Ves. 218, 236.
(5) 5 Beav. 558.
(6) 10 Cl. & F. 508.
(7) 2 V. & B. 367.
(8) 3 K. & J. 26.
(9) Law Rep. 3 Eq. 474.
(10) 2 Keen, 658.
(11) 5 Madd. 232.

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so on to the eldest son of his descendants as far as the rules of law or equity will permit," and further, there is a request to the nephew "to do all in his power, by his will or otherwise, to give effect to this my will as to these things so directed to go as heir-looms as aforesaid."

On the other side, it is contended by Mrs. *Shelley*, the widow of *John Shelley*, the first taker, that the substance of the whole of this bequest is a bequest to *John Shelley*, with a wish and desire on the part of the testatrix that the jewels should go on in this particular form, so as to be transmitted through his family; that he, the first taker, represents in himself the whole of the family, and that such was the intention of the testatrix, but the subsequent direction is simply the expression of a wish that he should do what she had done, viz., endeavour to perpetuate (according to *Knight* v. *Knight* (1)) and carry into effect her purpose, carrying the matter a stage further through the medium of his will than she could do by her own.

The point, which was very strongly put, as to the vesting of an absolute interest in the father (if that be not defeated by the executory trust afterwards) was that there was no express limitation to him for life, but that it was to him, "and on his decease to go and descend as heir-looms to his eldest son," and so on. The argument, and I think there was much weight in it, was, that there does not seem to be any intention in this early stage of the will that the first taker should take in any different way from the second, third, or fourth; that they were all to take these jewels as heir-looms, and that there is nothing to indicate that a different interest was intended to be created in the father from that which existed in the son, whatever that interest may be. Then there is the subsequent direction "or otherwise to give effect to this my will," which does seem to me very strongly to imply (subject to the question as to an executory trust) an absolute interest in the first taker, because she directs that by his will or otherwise (that is to say by deed in his lifetime) he should give effect to the transmission of these things in the manner she had directed them to go by her will. Looking to the first mode of limitation, it seems clear that *John Shelley* and his eldest son, and all who come after him,

(1) 3 Beav. 148.

are put in the same position, notwithstanding the application of the word "descendant" to the son's descendants, and not to the eldest son himself, but to the eldest son's sons. The first taker, *John Shelley*, being directed to take them as heir-looms, the eldest son is directed to take them as heir-looms, there is no indication of an intention on the part of the testatrix to make a difference in the mode of taking, but she simply points out the line in which the jewels are to go. The question that remains is, what is the effect of the subsequent words by which she requests her nephew "to do all in his power by his will or otherwise to give effect to this my will as to these things so directed to go as heir-looms as aforesaid." I confess it seems to me that there is a good and valid executory trust created. In *Knight* v. *Knight* (1) the testator had given certain directions, by no means of a very clear character, as to the transmission of his estates, and constituted and appointed the person "who shall inherit my said estates under this my will my sole executor and trustee, to carry the same and everything contained therein duly into execution; confiding in the approved honour and integrity of my family to take no advantage of any technical inaccuracies." Having made certain provisions for servants and others, and bequeathed his collections to the *British Museum*, the will concluded thus: "I trust to the liberality of my successors to reward any other of my old servants and tenants according to their deserts, and to their justice in continuing the estates in the male succession according to the will of the founder of the family, my above-named grandfather." The question being, whether the precatory words in the will were imperative on the devisee, Lord *Langdale* held—and I think he was perfectly justified in so holding, on the face of that very peculiar will—that although the objects of the trust, and the order in which they were to take, were sufficiently indicated, there was not sufficient clearness to make it certain that the words of trust were intended to be imperative, or to make it certain what was precisely the subject intended to be affected, or what were the interests intended to be enjoyed by the objects; and, accordingly, that the property was taken by the devisee unfettered by any trust.

It seems to me that here no such doubt exists. The testatrix

(1) 3 Beav. 148.

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does not request her nephew to do something which may be of a different character to that which is contained in her own will, but having desired that the jewels should go as heir-looms as far as the rules of law and equity will permit, she requests him to do all in his power by his will or otherwise to give effect to her will. I think the request is sufficiently strong for the purpose of creating a trust if the objects of that trust are certain, and the objects are certain, being a series of eldest sons. The intent is clear and precise, and the will must be executed. Now, it is quite settled that there is a mode of executing a trust of this description, subject to an observation—which was made in the exhaustive argument addressed to the Court—that the bulk of the authorities are those in which real estate has first been limited, and then a direction has come that the personal estate shall follow the limitations of the real, subject to the mode in which heir-looms are ordinarily limited with reference to the possession of family estates. In *Green* v. *Ekins* (1) Lord *Hardwicke* doubted whether he could limit a sum of money in the same way as real estate, though he was not a Judge who hesitated about limitations of this kind, and is supposed to have carried them too far in *Gower* v. *Grosvenor* (2). I do not think that that doubt has been approved, but independently of that, the question in this case is not one relating to money, but to family jewels, which are just as much an object of anxiety for transmission in a particular direction as the land itself. I cannot conceive that there is any difficulty with reference to these jewels being unconnected with any previous limitation, and I do not call in aid the fact that there were estates which were limited for the benefit of *John Shelley*, and those who came after him, because the testatrix does not in any way refer to that by her will. I do not, therefore, think that I am justified in taking that into account. Upon the question whether or not the Court will execute a trust of this description, *Rowland* v. *Morgan* (3) is a case of importance. Lord *Cottenham* there expressed an inclination to follow *Gower* v. *Grosvenor*, but considered himself bound by the more recent decisions (*Foley* v. *Burnell* (4), *Vaughan* v. *Burslem* (5),

(1) 2 Atk. 473.
(2) Barn. 54, and more fully reported from a MS. note, 5 Madd. 337.
(3) 2 Ph. 764.
(4) 1 Bro. C. C. 274.
(5) 3 Ibid. 101.

followed by Lord *Eldon* in *Countess of Lincoln* v. *Duke of Newcastle* (1), as affording the rule for the future), and accordingly held that, although there was a direction that the executors should make an inventory of all the chattels and effects which, including the jewels, were to be held as heir-looms, the bequest was to be treated as direct and not executory, and that the eldest son became absolutely entitled.

It is clear that in *Rowland* v. *Morgan* (2) Lord *Cottenham* thought that the Court if it had the power would execute the settlement, and in this case it seems to me that the objects are pointed out with extreme precision (a series of eldest sons) and that an executory trust is created, directing that the property shall go as heir-looms in the manner she has directed. That being so, the only remaining question is, how such a trust shall be executed. In *Lord Deerhurst* v. *Duke of St. Albans* (3), Vice-Chancellor Sir *J. Leach* seems to have erred in two respects, as although he affirmed the rule laid down and said that there was a direct gift and nothing executory, he did not, as Lord *Cottenham* observed in *Rowland* v. *Morgan* (4), very strictly act upon it when he declared all persons tenants for life whom being *in esse* at his death the testator might have made so, and went on to deal with it as an executory trust carrying into effect a series of limitations of a fantastical character which it is exceedingly difficult to follow out. That case went to the House of Lords as *Tollemache* v. *Coventry* (5), the decree of Sir *J. Leach* having been affirmed by Lord *Lyndhurst*, without any reasons stated, just as he was about to resign the Great Seal. Lord *Brougham* there pointed out that in no case whatever, whether you treated the trust as executory or executed, could a trust of the particular character contained in that will be carried into effect (6). Here there is no such difficulty. In *Countess of Lincoln* v. *Duke of Newcastle* (7), Lord *Eldon* pointed out all the difficulties there were in executing the trust in such a manner as literally to do all that the rules of law would permit, and although he seemed dissatisfied with the conclusion

(1) 12 Ves. 226.
(2) 2 Ph. 770.
(3) 5 Madd. 232.
(4) 2 Ph. 770.
(5) 2 Cl. & F. 611; 8 Bli. N. S. 547.
(6) See the observations of Lord *St. Leonards* on this case, Law of Property, p. 330.
(7) 12 Ves. 218,

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that was arrived at, yet in the subsequent case of *Jervoise* v. *Duke of Northumberland* (1), as was pointed out by Lord *St. Leonards* in *Rochfort* v. *Fitzmaurice* (2), Lord *Eldon* took care to remove any doubt which might have arisen in consequence of the expressions imputed to him, and gave in his acquiescence to the rule of the Court as to such trusts, when executory, as a settled doctrine. It would not be a reasonable way of framing the limitations to take, as was suggested by Sir *Roundell Palmer*, the fantastical method of saying that so long as all the people now in existence are alive the limitation shall exist. What the testatrix says is that she does not know how to frame any limitation to the objects of her bounty, but what she wishes is that it shall be continued to the objects of her bounty so long as the rules of law and equity will permit. All that one has to do is to settle the jewels to *John* for life, with remainder to *Edward* for life, with remainder to his eldest son or only child for the time being who shall attain the age of twenty-one, and if he dies in *Edward's* lifetime leaving a grandchild of *Edward* living at the death of his grandfather, then to that grandchild on attaining twenty-one. I have a little difficulty in going on with the line of limitation, for this particular reason, that the residuary legatee is not here, and I do not know what the result will be when the limitations are not exhausted. I do not know whether as residuary legatee *John Sykes* may not have something to say as to the jewels going back.

Mr. *F. V. Hawkins* referred to *East* v. *Twyford* (3); *Mayer* v. *Townsend* (4); *Briggs* v. *Penny* (5), as authorities that it was not the proper course to settle the life interest only without settling the remainders over.

After some discussion, the decision of His Honour upon this point was reserved.

Feb. 29. SIR W. PAGE WOOD, V.C.:—

A question in my mind was whether there was a possible interest in the residuary legatee of Mrs. *Parker* if the line should be ex-

(1) 1 Jac. & W. 559.
(2) 2 D. & War. 1.
(3) 4 H. L. C. 517.
(4) 3 Beav. 443.
(5) 3 Mac. & G. 546.

hausted, but upon consideration I think not, as it is not the case of the first taker, *John Shelley*, being made a simple trustee without taking any interest at all in the property, but he took the whole interest in it, subject to the necessity of his limiting it as the will directed. He is directed by all means in his power or otherwise to give effect to it, but that does not prevent him from being the *stirps* in whom the property vested, in whom the whole remains which is undisposed of. He is to do his best to perpetuate that intention of the testatrix as far as the rules of law or equity will permit, and having done that, it remains in him. I may refer to *Wood* v. *Cox* (1), not as being strictly analogous, but as affording a clue to the principle. The testatrix there gave all her property to Sir *G. N. Cox* for his own use and benefit, trusting and wholly confiding to his honour that he would act in strict conformity with her wishes, such wishes being that the several persons named in the second paper should have the provisions therein specified, and Lord *Cottenham* held that it was a gift of the property to Sir *George Cox* absolutely, subject only to the payment of the legacies specified in the second paper. I think the principle is the same here. She gives it to her nephew *John Shelley*, and she means him to take a beneficial interest in it, and if she had said nothing about an executory trust, the whole would have gone over to him absolutely, as his eldest son was not meant to take in any different way to him. She having fastened that executory trust upon him, that trust must be executed, but subject thereto the original interest intended to be conferred upon him as the head of the family, through whom this was to pass, remains. It does not appear to me that the residuary legatee was meant to have a claim. The first taker was meant to take it; he was to have the ownership of it, with a direction to carry out the executory trust in the way she has described.

MINUTES.—Declare that a good executory trust was created by the will and codicil of the testatrix, *Helen Parker*, of the jewels and jewellery thereby respectively bequeathed as heir-looms, and that such trust ought to have been executed by the late *John Shelley*, the nephew of the said testatrix, and that De-

(1) 2 My. & Cr. 684.

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fendant *Elizabeth Shelley*, the widow and executrix of the said *John Shelley*, is now bound to execute such trust.

Declare that under such trust the said *John Shelley* was entitled to the enjoyment of such jewels and jewellery during his life, and that Plaintiff *Edward Shelley*, the eldest son of the said *John Shelley*, is entitled to the enjoyment thereof during his life, and that upon the death of the said Plaintiff the same will be held in trust for the eldest son of the said *Edward Shelley*, if living at the decease of the said *Edward Shelley*, the same to become a vested interest in such son when he shall attain the age of twenty-one years, but if he shall die in the lifetime of the said Plaintiff *Edward Shelley*, or after him under the age of twenty-one years, leaving an eldest son born before the Plaintiff's decease, then in trust for such last-mentioned eldest son, to be a vested interest when he shall attain the age of twenty-one years; and in case the said jewels shall not become absolutely vested in any person under the limitations aforesaid, then (subject to the life interest of the said *Edward Shelley*) in trust for the said *John Shelley* absolutely.

Costs of all parties of the special case to be raised by the sale, with the approbation of the Judge in Chambers, of a competent part of the jewels.

Solicitors: Messrs. *Mason & Withall*; Messrs. *Freshfields*.

SPRINGHEAD SPINNING COMPANY *v.* RILEY.

V.-C. M.
1868
May 8;
July 31.

Trades Unions—Intimidation of Workmen—Injury to Property—Injunction.

The Defendants, who were officers of a trades union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the Plaintiffs pending a dispute between the union and the Plaintiffs. The bill prayed an injunction to restrain the issuing of the placards and advertisements, alleging that by means thereof the Defendants had, in fact, intimidated and prevented workmen from hiring themselves to the Plaintiffs, and that the Plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished:—

Held, upon demurrer, that the acts of the Defendants, as alleged by the bill, amounted to crime, and that the Court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property.

Demurrer overruled.

THIS was a demurrer to a bill filed by the *Springhead Spinning Company, Limited*, carrying on business as cotton spinners at *Springhead Lees*, near *Oldham*, in the county of *Lancaster*, where they employed a large number of hands, against *J. Riley* and *J. Butterworth*, the president and secretary of an incorporated society, calling itself the *Operative Cotton Spinners, Self-acting Minders, and Turners' Provincial Association*, which was a voluntary association of persons supported by moneys contributed by the members, and against a printer named *Carrodus*. The book of rules of the association contained a preface urging on the members the necessity of combination, and concluded with rules for the settlement, by the committee of the association, of all disputes between workmen and their employers, and for the payment of allowances to the men and their families while on strike.

The bill contained the following statements:—The managers of the Plaintiffs, owing to changes in the quantity of the cotton used in the winding and spinnings of the Plaintiffs, found it necessary, about the month of February, 1868, to re-adjust the amounts of wages then paid to the hands employed in their mill. Accordingly, on the 27th of February, a deputation of the hands, known as "minders," was invited to the offices of the Plaintiffs, and the pro-

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posed alterations stated to them, with a request that they would hold a meeting of the hands, and consider the matter. On the 4th of March following, the Defendants *Riley* and *Butterworth*, together with two persons representing themselves as two of the managing committee of the association, called on the Plaintiffs' managers, and stated they came as representatives of the association. The Plaintiffs' managers furnished the last-named Defendants and their companions with the proposed list of prices. The Defendants expressed themselves content with the proposed re-adjustment of wages, and left the Plaintiffs' premises at about the dinner hour of the hands.

Upon the return of the hands certain of the "minders," with the concurrence, and, in fact, at the instigation of the Defendants *Riley* and *Butterworth*, and other members of the association not known to the Plaintiffs, gave notice of their intention to leave at the expiration of a week, and on the 11th of March the hands, consisting of minders and piecers, quitted the Plaintiffs' employ.

There were, in fact, many persons competent and willing to take the situations vacated by the hands who had so left the Plaintiff's employ. But in order to prevent such persons from entering into engagements with the Plaintiffs for carrying on their business, and to prevent the hands who had so quitted the Plaintiffs' employ from re-engaging themselves, the Defendants *Riley* and *Butterworth* had recently, with the assent and concurrence of the members for the time being of the association, and out of moneys contributed by the association for that purpose, published, and caused to be posted on the walls and other public places in the neighbourhood of *Springhead Lees* and *Oldham*, divers placards in the following words:—"Wanted all well-wishers to the *Operative Cotton Spinners, &c. Association* not to trouble or cause any annoyance to the *Springhead Spinning Company, Lees*, by knocking at the door of their office until the dispute between them and the self-actor minders is finally terminated. By special order."—"*Carrodus, 32, Greaves Street, Oldham.*"

The Defendants *Riley* and *Butterworth*, with the like assent and out of the like moneys also, in order to prevent persons from entering into engagements with the Plaintiffs for carrying on the business, caused to be inserted in the *Manchester Guardian* and

other newspapers having a large circulation in *Springhead Lees* and *Oldham*, and elsewhere, where the persons reside who would be willing to work for the Plaintiffs, an advertisement similar to the placard before set forth.

(Par. 17). The said placards and advertisements were part of a scheme of the Defendants *Riley* and *Butterworth*, and the said association, whereby they, by threats and intimidation, prevented persons from hiring themselves to, or accepting work from, the Plaintiffs, and there were divers persons in, and in the neighbourhood of *Springhead*, and elsewhere, who, by reason of such notices and the liabilities under which they would place them in regard to the association, were intimidated and prevented from hiring themselves to the Plaintiffs.

Letters of remonstrance were sent by the Plaintiffs' solicitor to the Defendants *Riley* and *Butterworth*, and *Carrodus* and other persons, against the continuance of the advertisements and placards, and a public notice was issued to all persons in the neighbourhood, warning them against the continuance of the printing and publishing of these placards.

Notwithstanding such public notice and letters, the Defendants threatened and intended to publish other placards and advertisements of a similar nature. The Defendants *Riley* and *Butterworth*, and the association, had, by means of such notices and advertisements, in fact, intimidated and prevented divers persons from hiring themselves to, and accepting work or employment from, the Plaintiffs, although such persons were willing to work for, and to hire themselves to and accept work from, the Plaintiffs, and in particular, the Defendants had prevented *P. Killeen* and *B. Chadderton* from so hiring themselves, and had, in fact, by the means aforesaid, forced the said *Killeen* and *Chadderton* to depart from the hiring which already subsisted between them and the Plaintiffs.

The Defendant *Carrodus* had, since he was communicated with on behalf of the Plaintiffs, reprinted and republished such placards as aforesaid.

(Par. 30). The business carried on by the Plaintiffs was one of considerable magnitude, and the good-will thereof was worth many thousand pounds. It was essential to the maintenance of such good-will that the Plaintiffs' business should be continued as a

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going concern, and any stoppage of the Plaintiffs' mill, in addition to the large loss arising from the cessation of work, greatly depreciated the value of the good-will of the Plaintiffs' business, and was, in fact, an irreparable damage to the *corpus* of their property.

(Par. 31). By the acts of the Defendants the Plaintiffs were intended by the Defendants to be, and were, in fact, prevented from obtaining any persons willing to work at their mill or factory, and thereby the Plaintiffs were sustaining an actual damage or loss amounting to £178, or thereabouts, per week, and were in addition prevented from carrying on the business as a continuous and going concern, whereby the value of the *corpus* of the Plaintiffs' property was seriously diminished, and was put in jeopardy of being lost entirely.

The bill prayed that the Defendants *Riley* and *Butterworth*, as well on their own behalf as on behalf of all other the members of the association, their servants and agents, might be restrained from printing or publishing any placards or advertisements similar to those already set forth, or to the like effect, whereby the property of the Plaintiffs, or their business, might be damnified or injured, or whereby any persons might be unlawfully hindered from working in the Plaintiffs' mill or factory, or from hiring themselves to, or accepting work from, the Plaintiffs, and that damages might be awarded to the Plaintiffs for the loss and damage already sustained, or which might be sustained, by them in respect of the acts of the Defendants therein complained of, and that the Defendants might pay the costs of this suit.

The Defendants demurred.

The Vice-Chancellor having granted an interim injunction, the case now came on for argument upon the demurrers.

Mr. *Cotton*, Q.C., and Mr. *Bardswell*, in support of the demurrer of *Riley* and *Butterworth*:—

The relief sought by this bill is of an entirely novel character, and there is no case in which such an injunction has ever been granted. There are two grounds for sustaining the demurrers. The first is, that the acts complained of are not illegal; and, secondly, that if they were ever so illegal, they are not such acts as this Court could restrain by injunction. The statement made

by the bill is, that the Defendants are interfering to prevent persons from hiring themselves to the Plaintiffs. If this were the only ground of complaint, there would be nothing illegal in the conduct of the Defendants, because it was laid down as law by Mr. Baron *Bramwell*, in the case of *Reg.* v. *Druitt* (1), that it was not illegal for workmen to combine together to regulate the amount of wages, so long as they used no threats or violence to prevent other men from hiring themselves. The placards and advertisements are of a peaceful nature, and only intended to carry out the system of combination, which is perfectly legal; and there is no act of violence, and no threats alleged to have been used by the Defendants. The only attempt by the bill to raise a charge of violence is the allegation that the placards and advertisements are part of a scheme whereby the Defendants, by threats and intimidation, prevented persons from accepting work from the Plaintiffs. If this allegation were proved, it would be one of crime which is punishable under a penal statute, and the Court of Chancery having no jurisdiction in criminal cases, cannot interfere with a purely criminal charge. This was laid down by Lord *Eldon* in *Gee* v. *Pritchard* (2). The allegations in this bill prove distinctly that the offence, if there be an offence, which the Defendants have been guilty of, is a crime punishable by the Courts of Law, and this Court cannot interfere. In the case of a nuisance, the Court of Chancery only interferes where the Attorney-General comes in to protect the public, or where there is any special injury done to private property. Here there is no injury to property. The utmost that can be said is, that the acts complained of have a tendency to lower the amount of the Plaintiffs' profits; but this is not a ground for the interference of a Court of Equity. There are numerous instances of profits being interfered with between rival traders that would not constitute grounds for the interference of this Court. But if any damage is done to the Plaintiffs by an illegal act, then the Court of Law has power to award damages. In *Sutton* v. *South Eastern Railway Company* (3) the Court refused to exercise its equitable power of granting an injunction where the Plaintiff could recover damages for the injury he had sustained.

(1) 16 L. T. (N. S.) 855. (2) 2 Sw. 402, 413.
(3) Law Rep. 1 Ex. 32.

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Mr. *Keane*, Q.C., for the demurrer by *Carrodus*, the printer :—

By the Act of 20 & 21 Vict. c. 43, the Legislature has provided a remedy for cases arising between employers and workmen, and the Court of Chancery has no power to interfere. In the case of *Wood* v. *Bowron* (1) the Court refused to sustain a conviction by the justices at *Stockton*, on the ground that no threat was held out by the workmen's society. There was no doubt a combination of the workmen to regulate the terms upon which certain men should be employed, and in consequence of an employer having acted contrary to the rules of the society, they ordered that no member of the society should work for that employer. They went even further, for they demanded that certain expenses said to have been incurred by the society should be paid before any of the men should return to work. Still, the conviction was quashed. Chief Justice *Cockburn* expressed his opinion that in order to bring the case within the statute, it was necessary that there should be a threat or intimidation with the object of compelling the master to alter his conduct. In this case there is no allegation except in general terms of threat or intimidation. There is no criminal act within the statute; and if there were, then it would be for the Court of Law to punish the crime, and not a Court of Equity.

Mr. *Glasse*, Q.C., and Mr. *Ince*, in support of the bill :—

This is a case standing upon an old established jurisdiction of the Court of Equity, although applied to a new subject. If an act being illegal tends to the injury of property, then the Court may interfere to restrain the act complained of. First, then, the act is illegal. It is alleged by the bill, and consequently admitted by the demurrer, that the conduct of the Defendants was part of a scheme whereby they, in fact, by threats and intimidation prevented persons from hiring themselves to, or accepting work from, the Plaintiff. This allegation brings the case within the terms of the statute 20 & 21 Vict. c. 43. The case of *Wood* v. *Bowron* was decided on the ground that the justices against whose order the appeal was made had not stated that they had drawn the inference that the act complained of was a threat or intimidation,

(1) Law Rep. 2 Q. B. 21.

and therefore, that the case was not brought within the statute. But in *Skinner* v. *Kitch* (1), where a master builder received notice from a carpenters' union, that four of his men who belonged to the union would be ordered to leave his employment unless a fifth workman, also in his employ, became a member of the union, it was decided that the secretary of the union was guilty of having by threats endeavoured to force the employer "to limit the description of his workmen."

Then, although this is a criminal act, still the Court of Chancery has power to interfere by injunction in case there is any injury done to property. This was decided in *Macaulay* v. *Shackell* (2). *Clark* v. *Freeman* (3) was dissented from by Lord Justice *Cairns* in the case of *Maxwell* v. *Hogg* (4), and even there the Master of the Rolls would have interfered by injunction if he had been satisfied that any mischief was done to the Plaintiff's property. *Emperor of Austria* v. *Day* (5) is still stronger. In *Walker* v. *Brewster* (6) the Plaintiff complained that his property would be rendered less enjoyable and comfortable by the conduct of the Defendant; and on that ground an injunction was granted. In *Banks* v. *Gibson* (7) the mere right of partners to the use of the name of a firm was held to be sufficient evidence of property to entitle the Court to interfere; and the cases of restraining the use of a trade mark, by which the property of another is damaged, are of frequent occurrence. *Seixo* v. *Provezende* (8) is one of such cases. In *Prince Albert* v. *Strange* (9), the very shadowy right to restrain the publication of a catalogue of private pictures was maintained; and in *Thomas* v. *Oakley* (10) a Defendant who had a right of taking stone from the Plaintiff's quarry for building purposes connected with one portion of his estate, was restrained from taking stone to be used in another portion of the estate. There the distinction between waste and trespass was disregarded, and the jurisdiction against waste, by injunction, was applied to trespass.

Mr. *Cotton*, in reply.

(1) Law Rep. 2 Q. B. 393.
(2) 1 Bli. (N.S.) 96, 127.
(3) 11 Beav. 112.
(4) Law Rep. 2 Ch. 310.
(5) 3 D. F. & J. 217.
(6) Law Rep. 5 Eq. 25.
(7) 34 Beav. 566.
(8) Law Rep. 1 Ch. 192.
(9) 1 Mac. & G. 25.
(10) 18 Ves. 184.

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July 31. SIR R. MALINS, V.C., after stating the facts, and referring to the Acts 6 Geo. 4, c. 129, the *Masters and Workmen's Act*, and the Act of 1859 (20 & 21 Vict. c. 43), continued:—

These Acts have received an authoritative construction in the direction of Mr. Baron *Bramwell* to the jury in the case of *Reg.* v. *Druitt* (1). The substance of that judgment, in which I entirely concur, is this:—That every man is at liberty to induce others, in the words of the Act of Parliament, "by persuasion or otherwise," to enter into a combination to keep up the price of wages, or the like; but directly he enters into a combination which has as its object intimidation or violence, or interfering with the perfect freedom of action of another man, it then becomes an offence not only at common law, but also an offence punishable by the express enactment of the Act 6 Geo. 4, c. 129. It is clear, therefore, that the printing and publishing of these placards and advertisements by the Defendants, admittedly for the purpose of intimidating workmen from entering into the service of the Plaintiffs, are unlawful acts, punishable by imprisonment under the 6 Geo. 4, c. 129, and a crime at common law.

But if these acts amount to the commission of a crime only, it is clear that this Court has no jurisdiction to restrain them. In the celebrated case of *Gee* v. *Pritchard* (2), the object of which was to restrain the publication of letters written by the Plaintiff to the Defendant, Lord *Eldon* says: "The publication of a libel is a crime, and I have no jurisdiction to prevent the commission of crimes, excepting, of course, such cases as belong to the protection of infants where a dealing with an infant may amount to a crime—an exception arising from that peculiar jurisdiction of this Court." Further on Lord *Eldon* says: "The question will be, whether the bill has stated facts of which the Court can take notice, as a case of civil property, which it is bound to protect."

Lord *Campbell*, in the case of the *Emperor of Austria* v. *Day* (3), quotes that passage with approbation.

The jurisdiction of this Court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate, or tend to the ulti-

(1) 16 L. T. (N.S.) 855. (2) 2 Sw. 402, 413.
(3) 3 D. F. & J. 239.

mate, destruction of property, or to make it less valuable or comfortable for use or occupation. It will interfere to prevent the destruction of property, as shewn by *Lowndes* v. *Bettle* (1). Mr. *Lowndes* and his son were in possession of very large estates. The Defendant *Bettle* conceived that he was entitled to those estates. Time had run against him if he ever had a title, but nevertheless he thought he would keep his title up by occasionally entering upon the Plaintiff's property, and cutting down a tree, or digging up the turf. Mr. *Lowndes* filed a bill for an injunction. It was argued on behalf of the Defendant that this was a mere trespass, and not within the jurisdiction of this Court. Nevertheless, in a most elaborate judgment, Vice-Chancellor *Kindersley* granted an injunction because there were repeated acts of trespass which went to the destruction of property, and it was the duty of this Court to protect property against such acts. The familiar cases of light and air, nuisance, and trade marks, will illustrate what I have said, namely, that the Court will interfere where the acts complained of go to the destruction or material diminution of the value of property. It is distinctly charged by this bill, and it is consequently admitted by the demurrers, that the acts of the Defendants which are complained of do tend to the immediate destruction of the value of the Plaintiffs' property. The 30th and 31st paragraphs of the bill go distinctly to this point, and in the 17th paragraph it is stated that these placards and advertisements are, in fact, part of a scheme of the Defendants whereby they, by threats and intimidation, prevent persons from hiring themselves to or accepting work from the Plaintiffs. If the Defendants *Riley* and *Butterworth* had carried on a manufactory in the neighbourhood of the Plaintiffs' works, and had by any process poured noxious vapours into the Plaintiffs' mill to such an extent as to render it impossible for them to procure workmen to carry on their operations, that would have been a nuisance tending to the destruction of the Plaintiffs' property which this Court would have restrained by injunction; and so it would if the Defendants had, by darkening their ancient lights, rendered it impossible or even difficult to carry on their trade; and so if the Defendants had, by constructing a material obstruction, such as building a wall, ren-

(1) 33 L. J. (Ch.) 451.

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dered the access by the workpeople of the Plaintiffs to their mill impossible. Why should the Defendants be less amenable to the jurisdiction of this Court because they proceed to destroy the value of the Plaintiffs' property in another but not less efficacious mode, namely, by their threats and intimidation rendering it impossible for the Plaintiffs to obtain workmen, without whose assistance the property becomes utterly valueless for the purposes of their trade?

The truth, I apprehend, is, that the Court will interfere to prevent acts amounting to crime, if they do not stop at crime, but also go to the destruction or deterioration of the value of property. That was the principle on which the Court restrained the proceedings of M. *Kossuth*, with regard to the Hungarian notes in the case of the *Emperor of Austria* v. *Day* (1). Lord Chancellor *Campbell* says (2): "In arguing the appeal in this Court the counsel for the Plaintiff have entirely repudiated any claim to the injunction on the ground of a mere invasion of any prerogative of the Plaintiff as a reigning sovereign, or of the notes being to be used to effect a revolution, or for any political purpose; and they have very freely admitted that this Court has no jurisdiction to interfere merely with a view to prevent revolution, and that it is only to prevent an injury to property that in a case like this its aid by injunction is invoked." Lord *Campbell* again says, in the next page: "I am clearly of opinion that the Plaintiff here states unlawful acts and intentions of the Defendants, by which, if not prevented, a damage will be done to the property of the Plaintiff as sovereign, and to the property of his subjects, whom he has a right to represent in an English court of justice." And again, His Lordship quotes that passage from Lord *Eldon*, that the Court will not interfere to prevent a crime, but he says the question will be whether the bill has stated facts which the Court can take notice of as a case of civil rights which it is bound to protect. Lord Justice *Knight Bruce* expresses himself to the same effect, and there is one remarkable passage in the judgment of Lord Justice *Turner*, which, I think, puts the matter upon a most satisfactory footing. His Lordship says (3) that the effect of the introduction of these spurious notes by *Kossuth* into the kingdom would be "to endanger,

(1) 3 D. F. & J. 217. (2) 3 D. F. & J. 232.
(3) 3 D. F. & J. 253.

to prejudice, and to deteriorate the value of the existing circulating medium, and thus to affect directly all the holders of Austrian bank notes, and indirectly, if not directly, all the holders of property in the state. The same "great authority to which I have referred" (that is, to *Vattel*, book 1, cap. 10) "has very clearly pointed out these consequences. But it is said that the acts proposed to be done are not the subject of equitable jurisdiction, or that, if they are, the jurisdiction ought not to be exercised until a trial at law shall have been had. To neither of these propositions can I give my assent." Then comes the passage on which I mainly rely—"I agree that the jurisdiction of this Court in a case of this nature rests upon injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this Court. I do not agree to the proposition that there is no remedy in this Court if there be no remedy at law, and still less do I agree to the proposition that this Court is bound to send a matter of this description to be tried at law."

The same rule is in effect laid down by Lord *Eldon* in the celebrated case of *Macaulay* v. *Shackell* (1). Lord *Eldon* there says:—"The Court of Equity has no criminal jurisdiction, but it lends its assistance to a man who has, in the view of the law, a right of property, and who makes out that an action at law will not be a sufficient remedy and protection against intruding upon his publication."

It was because he considered there was no injury to property that Lord *Langdale* refused to interfere in favour of Sir *James Clark*, in *Clark* v. *Freeman* (2), to restrain the sale of pills under the false representation that they were made from the prescription of the Plaintiff, Sir *James Clark*. I confess myself wholly unable to coincide in the reasoning of Lord *Langdale* in that case, and the decision may now, I think, be considered as erroneous, for the reasons stated by Lord *Cairns* in *Maxwell* v. *Hogg* (3), where he says: "It always appeared to me that *Clark* v. *Freeman* might have been decided in favour of the Plaintiff, on the ground that he

(1) 1 Bli. (N.S.), 96, 127. (2) 11 Beav. 113.
(3) Law Rep. 2 Ch. 310.

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had a property in his own name." And I must say that it is perfectly clear to my mind, at all events, that a man has a sufficient property in his own name to prevent another from falsely passing off, injuriously to his reputation, medicines as personally prescribed by him, which might cause a total destruction of his professional character. I think it was because there was an interference with property that Lord *Langdale* did grant an injunction against the directors of a joint stock company publishing the name of the Plaintiff as a director without his authority, and he put it on the ground, that to allow his name to be used would throw a liability on him, which, in other words, would affect his property.

In the present case, the acts complained of are illegal and criminal by the Act of Geo. 4, and it is admitted by the demurrers that they were designedly done as part of a scheme, by threats and intimidation, to prevent persons from accepting work from the Plaintiffs, and, as a consequence, to destroy the value of the Plaintiffs' property. It is, in my opinion, within the jurisdiction of this Court to prevent such or any other mode of destroying property, and the demurrers must, therefore, be overruled.

The Defendant *Carrodus*, as stated in the bill, persisted in reprinting and re-publishing the placards and advertisements after a warning from the Plaintiffs, and his demurrer must consequently be overruled.

In coming to this conclusion I desire to be understood as deciding simply on what appears upon this bill and these demurrers. For the reasons I have stated I overrule these demurrers, because the bill states, and the demurrers admit, acts amounting to the destruction of property. Upon the general question whether this Court can interfere to prevent these unlawful proceedings by workmen issuing placards amounting to intimidation, and whether acts of intimidation generally would go to the destruction of property, that will probably have ultimately to be decided at the hearing of this cause. In the meantime I would only make this observation, that by the Act of Parliament it is recited that all such proceedings are injurious to trade and commerce, and dangerous to the security and personal freedom of individual workmen, as well as the security of the property and persons of the public at large; and if it should turn out that this

Court has jurisdiction to prevent these misguided and misled workmen from committing these acts of intimidation, which go to the destruction of that property which is the source of their own support and comfort in life, I can only say that it will be one of the most beneficial jurisdictions that this Court ever exercised.

With regard to the costs, I do not intend, considering the novelty and importance of the question raised by this bill and these demurrers, to overrule them with costs in the ordinary course, but I shall reserve the costs.

Solicitors for the Plaintiffs: Messrs. *Clarke, Woodcock, & Ryland.*
Solicitor for the Defendants: Mr. *W. P. Roberts.*

ATTORNEY-GENERAL *v.* BUNCE.

Construction—Charities—Presbyterians—Baptists—Dissenters' Chapels Act (7 & 8 Vict. c. 45)—Cy-près.

Under wills dated between 1716 and 1803, various funds were bequeathed for the ministers, and otherwise for the benefit of Protestant Dissenters called "*Presbyterians*," at *D.* It appeared that there had existed a Presbyterian chapel at *D.* since 1662, that some *Baptists* had associated with them, and that the Baptist element had in course of time so much increased, that in 1863 only a few of the members were Presbyterian, and since 1803 the ministers of the chapel had been Baptist. An information was filed in 1863, raising the question who were entitled to these funds, which were proved to have been enjoyed by the minister and congregation of the chapel for the last seventy years, and in 1865 a congregation was formed by persons claiming to be strict *Presbyterians*, who now claimed the funds as such:—

Held, that the use of the term "*Presbyterian*" did not amount to a requisition that any particular religious doctrines or mode of worship should be taught or observed; and that under the *Dissenters' Chapels Act* (7 & 8 Vict. c. 45), the usage for the last twenty-five years must be held conclusive, and the congregation who had enjoyed the funds must be declared entitled:

Held also, that, upon the evidence, there had been no strictly Presbyterian congregation at *D.* for the last century, and that the funds would, if necessary, be applied *cy-près* in favour of the congregation in possession.

2 Ch. D. 560

ADJOURNED SUMMONS.

The information was filed in 1863 by the Attorney-General, the certificate of the Charity Commissioners having been obtained, for

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the purpose of ascertaining who were the persons entitled to certain charitable funds, amounting to about £75 a year, which had been received for many years by the minister and congregation of a chapel at *Devizes*, and for having a scheme settled for the management of the same.

The funds in question were bequeathed by the wills of various persons between the years 1716 and 1803.

William Temple, by his will, dated 24th of November, 1716, gave a rent-charge of £2 on land near *Devizes*, to be paid half-yearly to the settled parson or parsons who for the time being should officiate as minister to the congregation or people called *Presbyterians*, in the borough of *Devizes*. The next will was that of *Sarah Hancock*, dated the 10th of December, 1740; and she gave a rent-charge of £3, payable out of a house at *Devizes*, to trustees for them to dispose of it to the use of the minister in holy things in Presbyterian meeting at *Devizes*. *Mary Russell*, by her will, dated the 17th of May, 1755, gave to trustees £300, upon trust to place the same in real or government securities, and pay the interest to the pastor or minister for the time being of Protestant Dissenters within the borough of *Devizes*, commonly called "*Presbyterians*," with provision that when the trustees, by death or otherwise, should be reduced to two, then they, with the consent of the minister or pastor, should appoint so many other fit and proper persons, being Protestant Dissenters commonly called "*Presbyterians*," or of that persuasion, as should make five, and that the funds should then, by the advice of counsel learned in the law, be legally vested in them. *Thomas Bancroft*, by his will, dated the 23rd of November, 1774, gave to trustees £500 upon trust to see it placed out at interest in the names of the minister or ministers, pastor or pastors, of the *Society of Protestant Dissenters of the Presbyterian Denomination* assembling for religious worship in *Devizes*, so as the same might be called in and put out again upon such security as the minister or ministers, pastor or pastors for the time being of the said society of Protestant Dissenters should approve. The same testator, by another part of his will, gave, in addition to the bequest thereinbefore contained, £500 to be placed out at interest as they should think fit, the interest to be applied to the education of the English language and writing of twenty poor boys belonging to the several

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parishes of *St. John* and *St. Mary*, and belonging to the Presbyterian denomination in *Devizes*; and his will was that as near an equal number as possible should be taken from each parish and congregation. *Sarah George*, by her will, dated the 2nd of May, 1783, gave £100 to the person who should for the time being be the minister or teacher of the Protestant Dissenters of the Presbyterian persuasion in *Devizes*. *Betty Sloper*, by will, dated the 18th of February, 1803, gave to the person or persons who at the time of her decease should act in the capacity of trustee or trustees of or for the congregation of people called "*Presbyterians*" within the borough of *Devizes*, and the successor or successors, trustee or trustees for the said congregation, the sum of £20, to be by him or them improved and applied for the use and benefit of the said congregation. There were also three other wills making similar gifts.

The information stated that there was so far back as the seventeenth century, a religious society of the denomination called "*Presbyterians*" in *Devizes*, the first minister being *Benjamin Flower*, one of the ejected ministers under the *Act of Uniformity*, and that the society had a chapel in which their religious services were performed: that in the year 1790 the chapel of the society became decayed and useless, and the then members of the society purchased a piece of land whereon a new chapel was erected, and the land so purchased was conveyed to certain trustees without any declaration of trust, but that it was believed that the sale of the old chapel and the materials furnished, in part, the purchase-money for the new site: that no declaration of trust of the new chapel was ever executed until the 3rd of December, 1803, when, by indenture of that date, the meeting-house, chapel, or place of divine worship, with the burying ground adjoining the same, were conveyed to ten trustees upon trust to permit the meeting-house and the lands belonging thereto to be used as and for a place of public worship by the society or congregation of persons styling themselves "*Presbyterians*," so long as any three or more persons of that persuasion should reside in *Devizes* or within ten miles thereof, and should attend divine service at the meeting-house; and the will contained certain other provisions in case the said society at any time thereafter should not consist of three persons, or the said meeting-house should not be allowed or

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permitted by the laws and statutes of the realm to be used, or should be prevented and hindered. The information further stated that it was difficult to state what were the exact religious opinions of the original congregation that worshipped in the chapel, but whatever they were it appeared that they were not so far discordant from the opinions of the religious body now called "*Baptists*," as to prevent their joining in the same worship and forming members of the same congregation; and that from 1803 there had been an unbroken succession of ministers of the Baptist persuasion, and that the congregation had consisted of an increasing proportion of *Baptists*, so that there were scarcely any members of the congregation who were not of that persuasion: that in the year 1807 the members of the congregation who called themselves "*Presbyterians*," agreed to unite with those who called themselves "*Baptists*" at the Lord's Supper, which they before had received separately: that in the year 1823 the Defendant, the Rev. *John Stacy Bunce*, who was a *Baptist*, was appointed to assist Mr. *Biggs*, the then continuing minister, as joint pastor, and in 1830 became sole pastor: that in 1837 the only known case of an appointment of an elder took place, and on that occasion one elder and two deacons were appointed, the elder being a *Baptist*, but that it was not known that any act had been performed by an elder of the congregation different from those acts which were performed by deacons of Baptist and Independent churches: that in 1834 the elder who was so appointed removed from *Devizes*, and no other elder by that designation had since been chosen.

By an indenture dated the 5th of April, 1837 (after reciting fully the indenture of the 3rd of December, 1803), the meeting-house and burying ground adjoining were conveyed to the Rev. *John Stacy Bunce* and his heirs, to the use of new trustees upon the trusts contained in the deed of 1803. In 1847 Mr. *Bunce* resigned his pastorship to the *Presbyterian Society* and to the *Baptist Society* meeting in the chapel separately, and in the same year the Rev. *W. Stanford*, also a *Baptist*, was elected pastor. By an indenture dated the 1st of December, 1851, after reciting that a church, or society of Christians, being Protestant Dissenters, had long existed at *Devizes* denominated "*Baptists*" and practising the baptism of adult persons, and not practising the baptism of infants, and

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that such church had assembled in the chapel or meeting-house called the "*Presbyterian Chapel*," in which chapel there also assembled another society denominated "*Presbyterians*," and for a few years past the said societies had by agreement joined in performing many church acts, but the said society of *Baptists* was then about to meet in a building to be provided for its own use alone separately from any other society, its discipline being that of the English Dissenters of the Independent or Congregational order, and the rite of baptism being confined to adults, the trusts of the said indenture were to "permit the said chapel to be used and employed at all times thereafter as a place of public religious worship for the service of God by the society of Protestant Dissenters thereinbefore mentioned, and by such other persons as should thereafter be united to the above society, which it was thereby declared and provided was to be of the Independent or Congregational order practising the baptism of adults, and not of infants, but admitting to the communion with them of the Lord's Supper other persons of piety who might not hold the doctrine of the society in regard to baptism, but might desire to communicate with the church at the Lord's Table, and also to permit to officiate in such chapel, as the minister, the Rev. *Charles Stanford*, the then present pastor of the said church, so long as he should be the pastor, and afterwards to permit to officiate in such chapel such person or persons holding and preaching the doctrines thereinafter mentioned as the members of the said society attending the said chapel, men or women, duly assembled for that purpose, or two-thirds of such attending members who should have been in communion with the church six months preceding, should from time to time elect to officiate as their minister or pastor in the said chapel."

It was stated in the answer of the Defendants *Bunce* and others, who were in possession of the chapel, that in 1852, when the old chapel was closed, there were eighty-eight *Baptists*, and nine *Presbyterians*, and that at the present time there were 151 *Baptists*, and five *Presbyterians*.

During the proceedings in Chambers certain persons, who since 1865, two years after the filing of the information, had held services, first in the *Bear Inn*, and since March, 1866, in the town hall of

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Devizes, claimed to be entitled to receive the funds, as being the only *Presbyterians* in *Devizes*, and the question as to the validity of their claim now came on by summons adjourned into Court.

From the evidence it appeared that the minister of this new congregation was also the minister of a church at *Southampton*, that he had been appointed to take charge of the congregation at *Devizes* by the *Presbytery of London*, and that the average number of persons attending Divine service in the town hall was about 40.

Evidence was also adduced to shew that the Presbyterian Church in *England* was not in connection with any church in *Scotland* in the sense of being under the jurisdiction of any church; but that there was a friendly intercourse between those churches, which was kept up with the free church in *Scotland*, and also with the *United Presbyterians* in *Scotland*: that there were seven Presbyteries in *England*, forming a synod: that in *Scotland* there were four gradations of Ecclesiastical Courts, in *England* only three, there being no general assembly in *England*, the power of the synod being equal to that of the general assembly in *Scotland*: and that it was less than eighty years ago that the synod was organized.

On behalf of the congregation of the original chapel there was an affidavit of Mr. *Paul Anstey*, who stated that he had attended Divine service in the Presbyterian chapel since the year 1808, and as a communicant at the Lord's Supper since the year 1811, and that the society in *Devizes* styling itself "*Presbyterian*," to which the gifts and bequests mentioned and referred to in the information were made, had never been in reality a Presbyterian society at all.

Mr. *Vaughan Hawkins*, for the *Attorney-General*, in submitting the question to the Court, stated that the Attorney-General's opinion inclined to favour the claim of the minister and congregation of the original chapel who had been in receipt of the funds, and that the case came within the *Dissenters' Chapels Act* (7 & 8 Vict. c. 45).

Mr. *Bevir*, for trustees of portions of the funds.

Mr. *Higgins*, in support of the persons claiming as *Presbyterians*:—

We claim the charity funds, as being the only *Presbyterians*

in *Devizes*, within the terms of the several wills. The case does not come within the *Dissenters' Chapels Act* (7 & 8 Vict. c. 45), which was passed in consequence of the *Hewley Case*. That case was quite different from the present, there being no terms pointing to any class, or at all limiting the trusts, and in such a case it would be proper to let in evidence of contemporaneous usage. But in this case the class to take is pointed out to be "*Presbyterians*," a term so well defined that the Court cannot travel out of the instruments to construe it.

It is true the Baptist congregation have for many years been in receipt of the charities, but that has been by a breach of trust, and the lapse of any period of wrongful possession is of no avail against a rightful claim: *Attorney-General* v. *Drummond* (1); *Attorney-General* v. *Shore* (2); *Attorney-General* v. *Pearson* (3); *Foley* v. *Wontner* (4); *Attorney-General* v. *Murdoch* (5); *Attorney-General* v. *St. Cross Hospital* (6); *Attorney-General* v. *St. John's College, Bedford* (7); *Attorney-General* v. *Ewelme Hospital* (8); *Broom* v. *Summers* (9); *Attorney-General* v. *Calvert* (10); *Attorney-General* v. *Goulding* (11); *Tudor's* Charitable Trusts (12); *Attorney-General* v. *Welsh* (13).

There has always been a continuous congregation of *Presbyterians* at *Devizes*. At first the *Baptists* joined with them, but it appears that the congregation which has received the funds in question, though in origin Presbyterian, has from time to time changed, and has for many years been Baptist, but that does not prevent the *Presbyterians* from claiming the charities, and contrary usage can only be relied on where the object of the charity is lost. The distinction between *Presbyterians* and *Baptists* was formerly so marked that it is impossible that any donor 100 years ago speaking of *Presbyterians* could have intended to include *Baptists*, who differ from *Presbyterians* in their history, doctrine, church

(1) 1 D. & War. 353; 2 H. L. C. 837.
(2) 11 Sim. 592; 9 Cl. & F. 383, 511, 545, 566.
(3) 3 Mer. 353.
(4) 2 Jac. & W. 247.
(5) 7 Hare, 445; 1 D. M. & G. 86, 129.
(6) 17 Beav. 435.
(7) 12 W. R. 1045.
(8) 17 Beav. 366.
(9) 11 Sim. 353.
(10) 23 Beav. 248.
(11) 2 Bro. C. C. 428.
(12) Page 226.
(13) 4 Hare, 572.

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government, and relation to the state. This appears from the following authorities :—*Neale's* History of the Puritans (1); *Mosheim's* Ecclesiastical History (2); *Hume's* History of *England* (3); *Quarterly Review* (4); *Hallam's* Constitutional History (5); *Toulmin's* State of Protestant Dissenters (6); *Hooker's* Ecclesiastical Polity (7). The doctrine of *cy-près*, therefore, cannot apply.

Mr. *Fry*, for the congregation of the old chapel:—

The claim raised by the other side is not a *bonâ fide* claim, and had it not been with the view of obtaining these funds the new congregation which has been formed would never have existed. The body which Mr. *Higgins* represents had no existence as at present constituted when these gifts were made, there being then no synod—he, in fact, representing the *Presbytery of London*. The existing congregation has existed from 1693; it may have undergone changes, but it has always existed as the congregation for whose benefit the donors, who were members, created these charities; and when some of the gifts were made the ministers of the chapel were Baptist. Presbyteries were, in fact, never established in this country: *Neale's* History of the Puritans (8); *Hallam's* Constitutional History (9); and formerly the term "*Presbyterian*" was applied to all orthodox dissenters, and not to any special doctrine or form of church government: *Doddridge's* Course of Lectures (10); *Murch's* History of *Presbyterians* and *General Baptists* in West of *England* (11).

This case comes clearly within the *Dissenters' Chapels Act* (7 & 8 Vict. c. 45), and under that Act we are clearly entitled. The doctrine of *cy-près* cannot arise as we are distinctly pointed out, but even if it could, the existing congregation would be the persons entitled to take under it, as representing most nearly the specified objects of the trusts.

Mr. *Higgins*, in reply.

(1) Vol. i. p. 40; vol. ii. pp. 102, 507.
(2) 2nd Ed. vol. iv. p. 132.
(3) Ed. of 1820, vol. vii. p. 32.
(4) Vol. x. p. 109.
(5) 5th Ed. vol. i. p. 617.
(6) Pages 98, 549.
(7) Page 137.
(8) Ed. of 1822, vol. iii. p. 282.
(9) 5th Ed. vol. i. p. 618.
(10) 4th Ed. p. 274.
(11) Page 10, Preface.

1868. April 22. SIR R. MALINS, V.C.:—

[After commenting on the evidence, and on the circumstances under which the new Presbyterian worship had been formed, most of the leading members being resident at *Southampton*, and the first minister having, at the same time, charge of a chapel at that place, continued:—]

Upon the evidence in this case I am clearly of opinion that the persons who assembled at the *Bear Inn* or in the town hall at *Devizes*, do not constitute a Presbyterian congregation within the meaning of the various donors of these charity funds. It is admitted that the so-called congregation had no existence till May, 1865, more than two years after the institution of this suit, and it is plain that it was brought into existence simply in the hope of becoming the recipient of these charities.

It was argued by Mr. *Higgins* that "*Presbyterians*" could never mean "*Baptists*," that there were always such broad and marked distinctions between the two bodies that they never can be confounded, and that the various wills under which these charities are derived so distinctly point out that *Presbyterians* are to be the sole objects of the gifts, that it is impossible that *Baptists* can be the proper recipients of the charities, and that, in fact, the word "*Presbyterian*" so distinctly points out particular religious doctrines, or opinions, or mode of worship, as to exclude the operation of the Act of the 7 & 8 Vict c. 45.

That Act, which is commonly called *Lord Lyndhurst's Act*, was introduced by Lord *Lyndhurst* in consequence of the difficulties arising in *Lady Hewley's Case*. The charities in that case having been founded in 1704 and 1709, the objects were poor and godly preachers of *Christ's* Holy Gospel, and the difficulty was to ascertain the meaning of those words. The true principle, as laid down by Lord *Eldon* in the case of *Attorney-General* v. *Pearson* (1), and in many other cases was, that the opinions of, or the doctrines prescribed by, the founder were to be established. The charities having been claimed by the *Presbyterians*, the *Independents*, the *Baptists*, and the *Unitarians*, the latter of whom had got into the possession of most of the property of the charities, it became necessary to

(1) 3 Mer. 353.

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investigate the ecclesiastical history of that period, and it was clearly made out that at that time there were three great and totally distinct bodies of Protestant Dissenters, namely, the *Presbyterians*, the *Independents* or *Congregationalists*, and the *Baptists*, but that the *Unitarians* did not exist at that time; and the Vice-Chancellor *Shadwell*, Lord *Lyndhurst*, and the House of Lords, arrived at the conclusion that Lady *Hewley* was a *Presbyterian*. That case, after a very long and expensive litigation, was, as I understand, compromised, and the charity was divided in certain proportions between the *Presbyterians*, the *Independents*, and *Baptists*. Lord *Lyndhurst* brought in the bill in consequence of the great difficulties which arose in that case in determining who were the founders of the old dissenting chapels which were spread over the country, the mode of worship which should be solemnized in them, the object of the charity endowment, and the gifts which were frequently attached to them. The Act provides that so far as no particular religious doctrines or opinions or mode of regulating worship appear in the will, deed, or other instrument creating the trust, the usage for twenty-five years immediately preceding any suit relating thereto shall be taken as conclusive evidence that such religious doctrines or opinions, or mode of worship, as have for that period been taught or observed in any meeting-house, may properly be taught or observed therein, and the right or title of any congregation to hold such meeting-house, and any fund for the benefit of such congregation, or minister or other officer of such congregation, shall not be called in question on account of the doctrines, or opinions, or mode of worship so taught or observed; and the Act provides that where any minister's house, school, or fund shall be given or created by any deed, will, or other instrument which shall declare in express terms, or by reference, the particular religious doctrines or opinions for the promotion of which the same are intended, then they shall be applied to promoting the doctrines or opinions so specified, any usage of the congregation to the contrary notwithstanding.

Do, then, the wills of the donors of these charitable funds require any particular religious doctrines, or opinions, or mode of worship to be taught or observed? It is contended that they do by the mere force of the term "*Presbyterian*," which is the desig-

nation of the congregation to which the bequest was made in each of the wills.

That the term "*Presbyterian*" originally designated a distinct body of Protestant Dissenters, can admit of no question. The Presbyterian form of worship was established in *England* during the Commonwealth, and it is a matter of familiar history that when the Presbyterian ministers who filled the churches were ejected by the *Act of Uniformity* in 1662, they spread over the country and founded Presbyterian churches in almost every part of it, and it is stated in the affidavit of Mr. *Paul Anstie* that this very congregation in *Devizes* was founded by *Benjamin Flower*, one of the ejected ministers, of whom an account will be found in *Calamy's Baxter* (1). This was, therefore, no doubt originally a Presbyterian congregation, and that is the reason of its being so described in all these wills.

It is, however, certain that in progress of time many of the original Presbyterian congregations gradually changed their views, some becoming *Independents*, others *Baptists*, and not a few became *Unitarians*—this appears from the evidence in the case of Lady *Hewley's* charities.

The evidence in the present case shews that, at all events for the last seventy years and upwards, the congregation which, in the deed of 1803, is described as "*Presbyterian*" has been actually a Baptist congregation with whom a few *Presbyterians* joined in all the important offices of religious worship—their belief in the main doctrines of Christianity being the same, and their differences being almost, if not entirely, confined to the question of infant or adult baptism, and some not very important matters of church government. The change having in this, as in many other cases, been gradual, it is no wonder that the congregation retained its old name of "*Presbyterian*." The will of *Betty Sloper*, made in 1803, seven years after the appointment of the Baptist Mr. *Biggs* to be minister of the chapel, and at a time when she must have been attending the chapel presided over by him, describes the congregation as Presbyterian, which shews, I think, very clearly, that the word "*Presbyterian*," was not intended to be used in its strict sense in describing the congregation. This gradual change in the charac-

(1) Page 731.

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ter of the old Presbyterian congregations is stated in the passage cited by Mr. *Fry* from the preface to *Murch's* History of the Presbyterian and General Baptist Churches in the West of *England*, and which is also set out in the statement of the Attorney-General in support of a scheme: "It must be remembered, however, that a large majority of the congregations noticed in these pages are of Presbyterian origin—that it was their usual appellation for upwards of a century—that the name is still frequently given to them, and that they are as fairly entitled to it now as were their venerable founders and more recent benefactors. For upwards of a century and a half the term '*English Presbyterian*' has not signified the Christian who, in religious matters, is governed by a synod, and believes the doctrines of the Trinity, the atonement, and original sin; it is true that customs have been voluntarily retained in our churches with regard to the allotment of certain offices to presbyters or elders, but the title was chiefly glorified in by our fathers because it indicated their union with a body of Protestant Dissenters bound by no fetters with regard to the church fellowship, and left by their trust deeds at perfect liberty to search for truth wherever it could be found." This statement is corroborated by various ecclesiastical historians to whom it is not necessary particularly to refer; and also by the opinions of the learned Judges in *Lady Hewley's Case*. I would, in particular, refer to the opinion of Mr. Baron *Gurney* (1).

I am, therefore, of opinion that the word "*Presbyterian*," which is used in these wills, is not now, and has not for the last century, been sufficiently definite to amount to a requisition that any particular religious doctrines, or opinions, or mode of worship should be taught or observed in this chapel; and it being unquestioned that the congregation has been Baptist, presided over by a succession of Baptist ministers for more than seventy years, I am of opinion that the case is within *Lord Lyndhurst's Act*, and that the usage for twenty-five years is consequently conclusive as to the objects of these charities. During that period they have been held and enjoyed by the Baptist congregation which succeeded that of 1790, and by them they must still be held and enjoyed.

But even if this were not so, it is, at all events, clear that there

(1) 9 Cl. & F. 547.

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is not, and has not for the last century, been any strictly Presbyterian congregation at *Devizes*, and if this Baptist congregation is not the object of these charities, they must fail altogether. This makes it a clear case for the application of the *cy-près* doctrine, and on that ground also I am of opinion that the congregation now worshipping in the chapel are the proper objects of the charities in question, and there must be a declaration accordingly.

The costs of the Attorney-General and of the congregation worshipping at the chapel must be paid out of the charity funds, the persons styling themselves "*Presbyterians*" to pay their own costs.

Solicitors: Messrs. *Fearon & Co.*; Messrs. *Wood, Street, & Hayter*; Messrs. *Poole & Gamlen*; Mr. *R. H. Peacock*.

HAMPSON *v.* FELLOWS.

V.-C. M.
1868
July 16.

Mortgage—Attornment Clause—Distress.

A. B. assigned the lease for twenty-one years of a house in which he resided, together with two policies of assurance upon his life, to the Defendant, by way of mortgage, to secure the repayment of £250 and interest, as well as the premiums upon the policies; and the mortgage deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagee in respect of the leasehold house at the yearly rent of £175, provided that the mortgagee might at any time, without notice, take possession of the premises and determine the tenancy. There was no specific provision that any part of such rent should be applicable to the principal of the debt. The mortgagor became bankrupt, and the mortgagee distrained upon the furniture in the house, which was not the property of *A. B.*, for a year's rent under the attornment clause, though at that time the landlord's rent of £115, the interest upon the money advanced, and the premiums upon the policies had been paid.

The Plaintiff, who was the owner of the furniture, filed a bill to restrain the sale:—

Held, upon a demurrer for want of equity, that the attornment clause was not intended to enable the mortgagee to repay himself any of the capital advanced, but only to secure the payment of rent, interest, and premiums. Demurrer overruled.

Pinkhorn v. *Souster* (1), and *Jolly* v. *Arbuthnot* (2), distinguished.

THIS bill was filed by *Agnes Hampson*, a widow. The Plaintiff's late husband, *James Hampson*, was at his death tenant of a house

(1) 8 Ex. 763. (2) 4 De G. & J. 224.

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in *Dorset Square*, where he resided, and where he had a large stock of furniture and other household effects. He died intestate in June, 1855, and administration to his estate and effects was granted to the Plaintiff. After the death of *James Hampson* the Plaintiff and her six children continued to reside in the same house, and to use the furniture and effects, and *John Hampson*, the eldest son, continued to carry on at the said house his father's business of a dentist. On the 7th of December, 1864, *John Hampson* took a lease of the house for twenty-one years at the rent of £115 per annum, and the Plaintiff and her children still continued to reside there. No division of the furniture and effects had ever been made between the children.

By an indenture of mortgage, dated the 25th of October, 1866, *John Hampson*, in consideration of £250 advanced to him by the Defendant, the Rev. *Spencer Fellows*, covenanted with the Defendant for the payment of the sum so advanced, with interest at £10 per cent. per annum; and by the same indenture *John Hampson* demised to the Defendant the house in *Dorset Square* for the residue of his lease, and also assigned to the Defendant two policies of assurance on his life for £1000, and £600 respectively, subject to a proviso for redemption of all the premises upon payment of the said sum of £250 and interest, on the 25th of April then next. The indenture contained the usual covenants by *John Hampson* for payment of the interest upon the money advanced, the rent of the house, and the premiums upon the policies, and it also contained the following clause or declaration of attornment:—"And this indenture also witnesseth, that for the consideration aforesaid the mortgagor doth attorn tenant from year to year to the mortgagee, his executors, administrators, and assigns, in respect of the said premises, at the clear yearly rent of £175, payable by equal payments, the first payment to be made on the 25th day of April next: provided that the mortgagee, his executors, administrators, or assigns, may at any time, without notice, take possession of the said premises and determine the tenancy."

At the time of the execution of this mortgage the Defendant retained out of the £250 two sums of £20 15*s.* and £11 17*s.* 6*d.*, being the amounts of the premiums which would become payable on the two policies upon the 15th of May, 1867, and the 2nd of

September, 1867, and *John Hampson* had since paid to the landlord of the house the rent of £115 up to the 25th of December, 1867, and had also paid to the Defendant the interest on the £250, which became due up to the 25th of October, 1867.

On the 16th of June, 1868, *John Hampson* was declared a bankrupt, and on the 24th of the same month the Defendant issued a warrant and levied a distress upon the goods and chattels in the house in *Dorset Square* for the sum of £175, as for rent due to him upon the 25th of October, 1867, and threatened to sell such goods and chattels immediately.

The bill alleged that the indenture of mortgage, and particularly the clause of attornment, were devised by the Defendant or his solicitors for the purpose of enabling him to obtain payment of the £250 advanced by him to *John Hampson* by the seizure and selling the goods and chattels upon the premises, under colour of a distress for rent reserved upon such attornment, and to obtain a security for the principal money advanced, and the interest thereon, upon such goods and chattels, without complying with the requirements of the statutes with respect to the registration of bills of sale of chattels, and without giving such notice to the Plaintiff of the charge attempted to be made as she would have had by a registration of a bill of sale; and that the distress was, in fact, a distress for rent reserved and alleged to be due under the indenture of mortgage, whereas the interest on the mortgage, and the rent to the landlord, and the premiums on the policies, had, prior to such distress, all been paid up to and beyond the 25th of October, 1867.

The bill prayed an injunction to restrain the Defendant from disposing of, retaining possession of, or interfering with, the furniture and household effects, goods and chattels, of the Plaintiff in the house in *Dorset Square*, and that the Defendant might pay damages for the wrongful seizure and detention of such furniture, goods, and chattels.

The Defendant demurred for want of equity.

Mr. *Dunning*, for the demurrer:—

The attornment clause in the mortgage deed was intended to enable the mortgagee to recover his principal as well as the out-

V.-C. M. 1868 HAMPSON v. FELLOWS.

goings upon the property, and this is a usual mode of obtaining payment of mortgage money. In *Pinkhorn* v. *Souster* (1) there was a mortgage deed with a similar clause. The action was for a distress on the Plaintiff's goods on the premises of one *Quested*, who was both mortgagor and tenant at will under a clause in the mortgage deed, and the Court held that the rent reserved by the deed was to go in reduction of the principal; and in *Jolly* v. *Arbuthnot* (2) there was a clause of attornment in a mortgage deed, under which the mortgagor attorned tenant from year to year to the receiver, and there was a proviso that if default should be made in payment of the mortgage money or interest, the mortgagee might enter and avoid the tenancy created by the attornment. The mortgagor became bankrupt, and it was held that the relation of landlord and tenant had been created between the receiver and the mortgagor, and the receiver was entitled to distrain and take the goods which had belonged to the mortgagor on the mortgaged premises. The distress in this case is perfectly legal, and the Court has no power to restrain the sale of the goods found on the premises, which the mortgagee is justified in taking in order to repay a portion of the principal, as well as interest and premiums payable under the mortgage deed. If the Plaintiff has any remedy, it is at law, and she has no equity to come here and stop the exercise of our legal rights.

The reason why the distress was levied for a year's rent was because no more than one year's rent can be taken when the matter is in the hands of the Bankruptcy Court, and that being so, it could make no difference, except in form, whether one year's rent from the commencement was taken, or whether it were a year ending at the last half-yearly day named in the attornment clause.

Mr. *Cotton*, Q.C., and Mr. *G. O. Edwards*, in support of the bill:—

In the case of *Pinkhorn* v. *Souster* it was expressly stated that the rent made payable in the mortgage deed was to go in reduction of the principal advanced, but the clause of attornment in this case could never have been intended to cover principal as well

(1) 8 Ex. 763. (2) 4 De G. & J. 224.

as interest. In *Walker* v. *Giles* (1) a similar clause to this was rejected, on the ground that its provisions were inconsistent with the general scope of the instrument, and in *Jolly* v. *Arbuthnot* (2) it was distinctly provided that part of the rent was to go in payment of principal. The rent payable in that case was £3500, of which £1500 was to be considered as for keeping down the interest, and £2000 for the gradual repayment of the principal advanced, which amounted to £30,000. The object of the mortgage deed in this case was to secure the payment of the landlord's rent, the interest upon the mortgage money, and the premiums upon the policies, and nothing more. The rent was paid up to October, 1867, and the interest and premiums had been paid up to a later date, consequently there was nothing due in respect of which the mortgagee could distrain. But under any circumstances he could not take possession of the furniture and effects in the house, which are actually the property of the Plaintiff as administratrix of her husband. It would be taking the goods of one person to pay the debts of another. If the course pursued by the Defendant were sanctioned, it would defeat the whole object of the *Bills of Sale Act* (17 & 18 Vict. cap. 36).

SIR R. MALINS, V.C.:—

There is no doubt that if the Defendant should succeed in his attempt to sell these goods, he will be taking the property of the mother to pay the debts of the son. It is a very harsh power, but if the Defendant had distrained solely for the purpose of recovering the money due for interest upon the mortgage and the premiums upon the policies, I am afraid he would have been justified.

Looking at this mortgage deed, however, and the allegations in the bill taken together, I come to the conclusion that the power of distress is intended merely to secure the different outgoings payable under the deed; that is to say, the rent of the house to the landlord, the interest upon the money advanced, and the premiums upon the policies, and it was not the intention to enable the mortgagee to obtain repayment by distress of any part of the principal. The outgoings under the deed had all been paid when the

(1) 6 C. B. 662. (2) 4 De G. & J. 224.

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distress was levied. The Defendant was not justified in levying a distress for rent which had been paid, and the Plaintiff is right in filing the bill. The demurrer must therefore be over-ruled. I think, under the circumstances, it ought never to have been filed.

Mr. *Cotton* then moved for the injunction, which was granted, but without prejudice to any right of the Defendant to distrain for rent due since the 25th of October, 1867.

Solicitors for the Plaintiff: Messrs. *Edwards & Edwards.*
Solicitor for the Defendant: Mr. *J. Vincent.*

DODKIN *v.* BRUNT.

V.-C. M. 1868 *May 7.*

Will appointing no Trustees—Trustee Act—Equitable Jurisdiction to appoint Trustees.

The Court has inherent jurisdiction in a cause to appoint trustees of a will in a case where no trustees were originally appointed by the testator.

THIS was a suit to administer the estate of *George Russell*, who, by his will, dated the 17th of August, 1866, devised certain property to an infant for life, with remainder to his wife for life, remainder to the children of the marriage in succession. There were executors appointed by the will, but no trustees were nominated. A decree was made in the suit directing that trustees should be appointed of the testator's estate.

The executors, who were the Defendants in the suit, were appointed trustees in Chambers, and minutes were prepared for carrying out the order, but the Registrar objected to draw it up, on the ground that the Act 15 & 16 Vict. c. 55, s. 9, did not embrace the case where no trustees had ever been appointed; for although the concluding words of the 9th section appeared to justify an order appointing a new trustee, whether there was any existing trustee or not at the time of the order being made, still the introductory words of the section seemed to contemplate the appointment of a new trustee only. The Registrar further stated that he could find no case in the office in which an appointment

had been made under the *Trustee Act*, where no trustee had been originally appointed by the testator. He suggested, however, that the appointment might be made under the general equitable jurisdiction of the Court, should the Act be considered insufficient.

Mr. *Osborne Morgan*, on behalf of the parties to the suit, stated the Registrar's objection, and submitted that the Court had power to make the order independently of the Act.

SIR R. MALINS, V.C. :—

My opinion is, that the Court has inherent jurisdiction in a cause to appoint trustees of a will, in a case where no trustees were originally appointed by the testator. I shall, therefore, direct the order appointing Messrs. *Brunt & Kent* trustees to be drawn up.

Solicitor: Mr. *R. Plowman*.

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1868
May 5.

In re ORIENTAL COMMERCIAL BANK. *Ex parte* MAXOUDOFF.

Company—Voluntary Winding-up—Bill of Exchange—Part Payment by Drawer—Proof of Debt—Winding-up Order under Supervision—Amount of Debt estimated at Date of Proof, not of Winding-up Order.

3 Ch 775
8 Eq 245.
1 Eq 695
5 Ch 435.
6 Ch 459
19 Eq 8

A bill of exchange having been accepted by a banking company, and indorsed to a holder for value, the company passed a resolution to wind up voluntarily, and the winding-up was ordered to be continued under supervision. After this date the holder received from the drawer a composition of 8*s.* 6*d.* in the pound on the amount of the bills. After this payment the holder lodged a claim with the liquidator for the whole amount of the bills:—

Held, that he was entitled to be admitted to prove only for the balance, after deducting the part payment.

In proof under a voluntary winding-up under supervision the person seeking to prove must allege and shew himself to be a creditor at the date of his proof for the amount he seeks to recover; and the date of the order for continuing the voluntary winding-up under supervision does not affect the question.

THIS was an adjourned summons on the part of the liquidator of the *Oriental Commercial Bank, Limited*, that a claim of *Artin Maxoudoff* for £2000 might be disallowed to the extent of £850, the amount of a composition of 8*s.* 6*d.* in the pound on three bills of exchange which the claimant had received from the drawer of the bills.

The bills were drawn on the 28th of March, 1866, for £2000, payable at three months, were indorsed to *Maxoudoff* for value, and had been accepted by the bank.

On the 12th of July, 1866, a resolution was passed to wind up the bank voluntarily; and on the 4th of August an order was made for continuing the winding-up under the supervision of the Court.

On the 20th of September, 1866, *Maxoudoff* received from the drawers the above-mentioned composition of £850.

On the 27th of December the bills were registered in *Maxoudoff's* name, in the matter of the bank; and on the same day *Maxoudoff* lodged with the liquidator a claim for the whole amount of £2000.

On the 13th of March, the claimant filed an affidavit, stating the facts, and claiming to be entitled to prove against the bank for the full amount of the three bills, and the interest due thereon from maturity, without deducting the composition; on the 18th he received a notice from the liquidator requiring him to come in and prove on the 27th instant, and informing him that he (the liquidator) disputed the claim on the authority of *In re Xeres Wine Company, Ex parte Alliance Bank* (1), before Vice-Chancellor *Malins*, on the 2nd of March.

The summons and claim now coming on together, the Vice-Chancellor held that counsel for the liquidator were entitled to begin.

Mr. *De Gex*, Q.C., and Mr. *W. W. Karslake*, for the liquidator:—

The rule that a creditor who has received any payment or composition in respect of a bill of exchange before he proves, can only prove for so much as remains, was established in bankruptcy so long ago as in *Cooper* v. *Pepys* (2), and *Ex parte Wyldman* (3), both before Lord *Hardwicke*. An attempt was made, but in vain, in *Ex parte Tayler* (4) to disturb this rule, on the ground that at law payment by a drawer was no defence for an acceptor, an argument which is disposed of by that authority, and by the ruling and observations of *Erle*, C.J., and other learned Judges in *Cook* v. *Lister* (5), where all the authorities are cited.

The foundation of the rule in bankruptcy is such as to call for a similar ruling in cases of voluntary winding up. In Lord *Hardwicke's* time there was no statutory enactment on the subject beyond the words in the 13 Eliz. c. 7, s. 2, which declare that creditors are to be satisfied by giving to every of them "a portion, rate and rate alike, according to the quantity of his or their debts." That was the only statutory foundation for Lord *Hardwicke's* rule. The words of the 133rd section of the *Companies Act*, 1862, declaring the consequences of a voluntary winding-up, are similar in meaning: "The property of the company shall be applied in satisfaction of its liabilities *pari passu*."

(1) Since reversed, Law Rep. 3 Ch. 769.
(2) 1 Atk. 107.
(3) 2 Ves. Sen. 113.
(4) 1 De G. & J. 302.
(5) 13 C. B. (N.S.) 543, 578, 585, 592.

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The decision of Vice-Chancellor *Malins* in *In re Xeres Wine Company* is distinctly in favour of the reduction. It is said that this decision has been departed from by the Master of the Rolls in *Ex parte Kellock* (1) before the Master of the Rolls on April 28. But, in truth, all his Lordship held was, that a creditor was entitled to prove for and receive dividends on the whole amount of his debt without giving credit for his securities, which had not then been realized. Here the amount in question had been paid even before the claim was lodged.

The VICE-CHANCELLOR referred to *Mason* v. *Bogg* (2), and *Attorney-General* v. *Cox* (3).

Mr. *De Gex*, in continuation:—

The cases of *Greenwood* v. *Taylor* (4) and *Mason* v. *Bogg* have no application here.

The 25th rule, which says that the value of such debts and claims as may be proved under the 158th section of the *Companies Act*, 1862, shall, so far as possible, be estimated according to the value at the date of the winding-up order, was referred to in *Ex parte Kellock*, but does not apply to claims which are defined and require no valuation under that section. Moreover, our case is that of a payment made after the winding-up order and before proof or even claim.

By sect. 170 of the *Companies Act*, 1862, the general practice of the Court of Chancery, including the practice hitherto in use in winding up companies, is applicable to all proceedings for winding up. Now, by the 74th section of the *Winding-up Act*, 1848, proof of debts is to be made in all respects as in bankruptcy; and the *Winding-up Act*, 1856, expressly made the Court of Bankruptcy the winding-up Court for limited companies. That is now altered, but still the Court of Chancery has power to remit all the proceedings in a winding-up to the Court of Bankruptcy. It would be very strange, therefore, if there were any difference in the rules of procedure.

(1) Since affirmed, Law Rep. 3 Ch. 769.
(2) 2 My. & Cr. 443, 447.
(3) 3 H. L. C. 240.
(4) 1 Russ. & My. 185.

Mr. *Peck*, for the claimant:—

Whether the rule at law, in administration, or in bankruptcy, is to be applied to this case, is wholly immaterial. By analogy to the 25th Order, which relates to contingent and unliquidated demands, the value of debts and claims is to be estimated at the date of the winding-up. This is the express view of the Master of the Rolls in *Ex parte Kellock.*

The right of an indorsee is that he may sue and proceed to judgment against the acceptor, every prior indorser, and the drawer, concurrently; but he can have only one satisfaction for his debt. If more than one of them are bankrupt, he can prove against all the estates. But after a winding-up order the hands of the creditor are tied. He cannot sue or proceed without leave of the Court (sect. 87). Hence the necessity of fixing the date of the order for continuing the voluntary winding-up under supervision as the period when the value of debts and claims is to be struck.

The VICE-CHANCELLOR observed that if the winding-up order was the time at which the value was to be estimated, a creditor might be paid in full, and yet afterwards be admitted to prove.

Mr. *Peck*:—The contention is that he ought to be admitted to prove for the whole, even although he be not permitted to realize more than the balance. Vice-Chancellor *Malins'* observations in *In re Xeres Wine Company* merely go to this—that, in administration, as in bankruptcy, a creditor must either give up his security and prove for the whole, or if he retains his security prove for the difference. There is no doubt that in administration a creditor against two estates for the same debt is entitled to receive dividends on the full amount from both estates until he has been satisfied: *Bonser* v. *Cox* (1).

In this particular instance we have a stronger case than either *In re Xeres Wine Company*, or *Ex parte Kellock.* The payment by the drawer was made in discharge of his own liability, not of the liability of the acceptors, who were primarily liable. Part payment by the drawer of a bill does not at law discharge the acceptor *pro tanto*, unless the bill is an accommodation bill:

(1) 6 Beav. 84.

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Jones v. *Broadhurst* (1). This is stated to be "the better opinion" by Mr. Justice *Byles* (2).

It has been said that *Jones* v. *Broadhurst* was overruled by *Cook* v. *Lister* (3); but *Cook* v. *Lister* was the case of an accommodation bill, which makes all the difference. *Jones* v. *Broadhurst* is not overruled. To some one or other this company is liable for the whole £2000. If we are allowed to prove only for the balance of £1150, the drawer of the bill will be entitled to prove for the £850 which he has paid, and will get a dividend, perhaps, of 15*s.* in the pound, in competition with us. This is the case of principal and surety, where the surety has paid part, but the principal remains liable for the whole. If the parties be left to their legal rights, we are entitled to prove for the whole, and any balance which may remain after we are paid in full we shall hold in trust for the drawer: *Ex parte De Tastet* (4).

It is impossible to argue against the authority of *Ex parte Tayler* (5); but there the Lords Justices were sitting in bankruptcy, and decided the question solely on the rule in bankruptcy; and if, as we say, the rule in Chancery is independent of that in bankruptcy, the decision does not apply. We say the right to sue at law for the whole debt remains. If so, does the rule in bankruptcy exclude our right to prove for the whole in a winding-up? We say it does not. Vice-Chancellor *Malins*, in *In re Xeres Company*, took care not to say that the rule in bankruptcy governed the case before him, but only said that the rule in administration followed the rule in bankruptcy. That the rules in a winding-up are not the same as they are in bankruptcy is shewn by *Chapman's Case* (6); *Smith, Fleming, & Co.'s Case* (7); *In re Haytor Granite Company* (8).

Considering that there had been no satisfaction at the date of the winding-up, that the whole debt was outstanding, that great injustice will be done if we are permitted to prove only for the balance, and none if we are permitted to prove for the whole debt, we say we have established our right.

(1) 9 C. B. 173.
(2) *Byles* on Bills, 9th Ed. p. 215.
(3) 13 C. B. (N.S.) 543.
(4) 1 Rose, 10.
(5) 1 De G. & J. 302.
(6) Law Rep. 1 Eq. 346.
(7) Ibid. 1 Ch. 538.
(8) Ibid. 77.

The VICE-CHANCELLOR called for a reply on the questions only whether part-payment by the drawer would prevent the holder from recovering at law for the whole amount from the acceptor, and, if not, whether the proof must not be for the full amount under the winding-up order.

Mr. *De Gex*, in reply :—

On the latter question, the winding-up being a proceeding for the equitable distribution of assets, the question of proof depends on rules of equity, and not on rights to proceed at law.

The VICE-CHANCELLOR:—Suppose the drawer, having paid a portion of the debt, became insolvent, would it be just to prevent the bill holder from suing the acceptor for the whole? He would be a trustee of the surplus for the drawer.

Mr. *De Gex*:—The way in which *Jones* v. *Broadhurst* (1) was dealt with by the Judges in *Cook* v. *Lister* (2) shews that the whole question in the former case resolved itself into a mere technical question of pleading. Everything favours Lord *Campbell's* reasoning in *Williams* v. *James* (3), that payment by the drawer to the holder is *primâ facie* a discharge of the debt; that is, will discharge the acceptor *pro tanto* from being sued by the holder. I submit that, after payment of the £850 by the drawer, the holder could not recover the whole, even at law, if the acceptor were to plead, as he ought to do, that the payment was made on his behalf.

But even if the law were otherwise, I submit the rule in winding-up is the same as that in bankruptcy, for the reasons already adduced.

SIR G. M. GIFFARD, V.C.:—

Upon consideration, I think that this claim must be reduced by the sum of £850.

Apart from the question of what might be the rights of the holder against the acceptor in an action, I confess I cannot entertain much doubt upon the question, for I cannot see what the

(1) 9 C. B. 173. (2) 13 C. B. (N.S.) 543. (3) 15 Q. B. 498.

V.-C. G. 1868 *In re* Oriental Commercial Bank. *Ex parte* Maxoudoff.

date of the winding-up order has to do with it. In all proofs in bankruptcy, a man who comes forward to prove must allege and shew himself to be a creditor for the amount which he seeks to recover at the date of his proof. I see no difference in that respect between proofs in bankruptcy and those in this Court. If that were not the rule, it would create the greatest possible inconvenience.

At the date when this creditor came to prove, beyond all doubt, this £850 had been paid to him, and had been paid to him by the drawer of these bills. I think it must be taken that the £850 was paid by the drawer for and on account of the acceptor. There is no evidence whatever to the contrary of that; and I think we must assume that the drawer paid in that way which would be most beneficial to him (the drawer), and of course the way most beneficial to the drawer would be to pay for and on account of the acceptor.

The difficulty which occurred to me was this: that if at law the holder had a right to go against the acceptor for the full amount, and if the drawer had been released by the holder upon receiving the dividend, it would be scarcely right towards the holder that he should be debarred from proving for the full amount, and yet that the drawer should be able to come in and prove for the difference. But that is the result of the transaction; because, if the drawer does pay the bill for and on account of the acceptor, from that moment the man who receives ceases to be a creditor of the acceptor at all to the amount which he receives; and the man who pays for and on account of the acceptor becomes a creditor of the acceptor for the amount which he so pays; and if the drawer is solvent it matters not whether he comes and pays or not, because the holder can always recover against the acceptor, and if he wishes the transaction to be different, he must make a different arrangement.

I think it quite clear, when one comes to look at the whole case, that if there are any legal rights whatever remaining in the holder when the payment has been made for and on account of the acceptor, they can be only legal rights remaining in him as trustee for the man who pays; and if they only remain in him as trustee for the man who pays, we know that, in this Court, when a man comes to prove as trustee, the trustee and *cestui que trust*

V.-C. G.
1868
In re
ORIENTAL COMMERCIAL BANK.
Ex parte MANOUDOFF.

must join together in the proof, and the trustee can assert no right for or on behalf of the *cestui que trust*, except such legal right as would be for the benefit of the *cestui que trust*, and as the *cestui que trust* would sanction.

I think the result of the payment by the drawer is, that thenceforth, if the payment be made for and on account of the acceptor, the man who receives ceases, so far as he is paid, to be a creditor of the acceptor.

The result of the case, therefore, is, that when these parties came to prove, they were creditors to the amount of £2000, less the amount of £850 which they had received; and that they can be held only to have a right to claim for the sum for which they were really creditors, and for no other sum.

The liquidator will have his costs out of the estate.

Solicitors for the Liquidator: Messrs. *Uptons, Johnson, & Upton.*
Solicitor for the Claimant: Mr. *T. F. Chorley.*

In re GRYLLS' TRUSTS.

V.-C. G.
1868
July 18, 20.

Will—Construction—"Personal Representatives" held to mean "Statutory Next of Kin"—Son "entitled upon his Father's Decease."

Testator bequeathed a legacy of £2000 upon trust for a married daughter, *F.*, for life, then for her husband for life, and after the death of the survivor for such persons "related by blood" to *F.* as she should appoint; and in default of appointment to transfer the same to such persons as would be "the personal representatives" of *F.* in case she had died sole and unmarried. By a codicil, the testator, in reciting the above bequest, referred to the above trusts as being trusts for the benefit of his daughter's "relations and next of kin." *F.* died in the testator's lifetime.

Held, that by the "personal representatives" of *F.* were meant the persons who were her statutory next of kin at the testator's death.

Stockdale v. *Nicholson* (1) distinguished.

By the codicil the testator declared that £1000, part of the said sum of £2000, should be held for the absolute use and benefit of his son, *H.*, but if he should be dead when the said sum of £1000 should "descend and come" to him under the trusts therein contained, then that the same should be paid to all the children of *H.* "except the one entitled to any real property upon his father's decease," share and share alike.

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(1) Law Rep. 4 Eq. 359.

V.-C. G.

1868

In re GRYLLS' TRUSTS.

Upon the death of *H.*, in 1862, after the testator's death, his eldest son became next tenant for life in remainder of the settled estates, expectant on the death without issue of the then tenant for life in possession, which happened in 1863. The surviving tenant for life of the legacy died in 1867:—

Held, that the eldest son of *H.* was excluded from participation in the £1000.

PETITION.

The Rev. *Richard Gerveys Grylls*, by his will, dated the 24th of January, 1840, bequeathed to his eldest son and executor, *Richard Gerveys Grylls*, £2000, upon trust to invest the same and pay the proceeds to his testator's daughter *Frances*, wife of *William Veale*, for life, and after her death to *William Veale* for life, and after the death of the survivor upon trust to pay the principal to such persons "related by blood" to *Frances Veale* as she should appoint, and in default of appointment as follows: "Upon trust to pay and apply or assign and transfer the same to such person or persons as would be the personal representatives of my said daughter in case she had died sole and unmarried." By a codicil dated the 25th of January, 1840, the testator, in reciting the above bequest, referred to the said trusts as being trusts for the benefit of his daughter's "relations and next of kin;" and proceeded to declare that his executor should stand possessed of the sum of £1000, part of the said sum of £2000, upon trust, if his (testator's) grandson, *Richard Gerveys Grylls*, should die under twenty-one without leaving issue, for the absolute use and benefit of his (testator's) son *Henry Grylls*, but if he should be dead when the said sum of £1000 should "descend and come to him" under the provisions thereinbefore contained, then testator directed that the said fund should be paid and applied as follows: "Unto and amongst such child or children of my son, *Henry Grylls*, as shall be living at his decease (except the one entitled to any real property upon his father's decease), share and share alike," and payable at twenty-one or marriage.

Frances Veale died in June, 1841, an infant, and without having had any issue.

The testator died on the 10th of July, 1841, leaving surviving him, his widow *Charity*, and three sons, the said *Richard Gerveys*, *William*, and *Henry*.

In 1842 the testator's grandson, *Richard Gerveys Grylls*, died, an infant, and without leaving issue.

Charity Grylls, the widow, died in 1849, having, by will, appointed her sons, the said *Richard Gerveys* and *William*, her executors; and having bequeathed her residuary estate for the benefit of her two granddaughters *Emma* and *Adelaide Frances*, daughters of her son *Henry*.

The testator's son, *Richard Gerveys Grylls*, died in 1852, having, by will, appointed his brother *William* his executor and residuary legatee.

Henry Grylls died in 1862, having, by will and codicils, appointed his son, the Petitioner, *Shadwell Morley Grylls*, his residuary legatee, and having appointed him and *Frederick Hill* his executors; and leaving surviving him his said son, the Petitioner, and three daughters, *Ellen*, wife of the Rev. *F. P. J. Hendy*, the said *Emma*, wife of *Samuel Broadhurst Hill*, and the said *Adelaide Frances*, wife of *Vivian Dering Majendie*.

William Grylls died in 1863, without issue, having, by will and codicils, made the Petitioner his residuary legatee, and having appointed as his executors *James Bell* and *Francis Cotton*. Upon the death of *William Grylls* without issue, the Petitioner became tenant for life in possession of the testator's settled estates. Had the Petitioner's father been living at *William Grylls* death, he would have been tenant for life in possession of the same estates.

On the 8th of September, 1867, *William Veale* died, and thereupon the fund representing the legacy of £2000 fell into possession.

The questions were: first, who became entitled on the testator's death under the gift in his will to the "person or persons who would be the personal representatives" of *Frances Veale* "in case she had died sole and unmarried;" and, secondly, whether the Petitioner was excepted out of the gift to *Henry Grylls'* children, inasmuch as he did not, on his father's decease, and not until the decease in 1863 of his uncle *William*, become entitled in possession to the real estate.

The executors, Messrs. *Bell* and *Cotton*, had paid the fund into Court.

The Respondents to the Petition were Mr. and Mrs. *Hendy*, Mr.

V.-C. G. 1868 *In re* GRYLLS' TRUSTS.

and Mrs. *Hill*, Mr. and Mrs. *Majendie* and the trustees of their settlement, and Messrs. *Bell* and *Cotton*.

Mr. *Willcock*, Q.C., and Mr. *Walter Coode*, for the Petitioner:—

By "personal representatives" of *Frances Veale* must have been intended the persons who at the testator's death would be her statutory next of kin; and if so, they became entitled as tenants in common: *Bullock* v. *Downes* (1).

The Petitioner did not become entitled to any real property upon his father's decease, and hence was not excluded from the gift to the children of *Henry Grylls*.

Mr. *Druce*, Q.C., and Mr. *Wickens*, for Mr. and Mrs. *Hendy*:—

On the first point we take the same view as the Petitioner. On the second, we say the Petitioner is excluded. On his father's death he became next tenant for life in remainder, expectant on the death without issue of his uncle *William*. Entitled does not necessarily mean immediately entitled in possession: *Macoubrey* v. *Jones* (2); *Chorley* v. *Loveband* (3). The intention of the testator is clear; that if a son of *Henry* should survive his father, and afterwards become entitled to the estates in possession, he was to be excluded from a share in this small sum of £1000.

Mr. *Kay*, Q.C., and Mr. *Bevir*, for Mr. and Mrs. *Hill*:—

We say that *Charity Grylls*, the mother of *Frances Veale*, became entitled to the whole of the moiety, as being the "nearest of kin" of *Frances*. The testator says nothing about the statute, but he does speak of persons "related" to her "by blood." That means nearest of kin in blood. If so, the mother would clearly take in exclusion to brothers: *Withy* v. *Mangles* (4); *Avison* v. *Simpson* (5).

The recent decision of Vice-Chancellor *Malins*, in *Stockdale* v. *Nicholson* (6), is in our favour.

On the second point we support the last contention.

Mr. *W. M. James*, Q.C., and Mr. *Daw*, for the executors.

(1) 9 H. L. C. 1.
(2) 2 K. & J. 684.
(3) 33 Beav. 189.
(4) 10 Cl. & F. 215.
(5) Joh. 43.
(6) Law Rep. 4 Eq. 359.

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SIR G. M. GIFFARD, V.C.:—

As regards the first point, it is clear that by "personal representatives" the testator meant natural, and not legal, personal representatives. It is a most improbable thing, that the testator meant his daughter's executor or administrator to take beneficially.

But the question is, whether by this expression were meant the nearest in blood of *Frances Veale*, or her next of kin according to the *Statute of Distributions*. In a context, such as the present, "personal representatives" means persons who are entitled as next of kin under the statute.

The case of *Stockdale* v. *Nicholson* (1) before Vice-Chancellor *Malins* is not the same as this; for there the words were the "next personal representatives" of the daughter named.

Therefore I think that those persons are entitled who would take as next of kin under the *Statute of Distributions* of *Frances Veale*, the testator's daughter.

As to the second point, the words clearly mean, that if the son should survive his father and become entitled in possession, he was not to participate in the £1000.

The Petitioner, therefore, is excluded from any share in this moiety of the fund.

Solicitors: Messrs. *Coode, Kingdon, & Cotton.*

HERRICK *v.* FRANKLIN.

V.-C. G.
1868
July 10.

Will—Construction—Real and Personal Estate blended.

Testator gave his real and personal estate to his son *D.* (an imbecile) and to *D.*'s mother, "she to hold all in trust for him, with power to appropriate such sums as may not be necessary for her own proper support and his, to her other son and daughter, *J.* and *A.*, but so that they are employed for their support and maintenance, and not to be risked in any way that would involve the destruction of the capital. And I direct that whatever may be preserved till the decease of my wife be so placed in trust as that my afflicted child (*D.*) may always be provided for, and my son *J.* and my daughter *A.*, both of which I appoint trustees to this my will, together with my wife, that they

(1) Law Rep. 4 Eq. 359.

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15 Eq. 111.

may have a voice in such arrangements as may be needful, but in case of bankruptcy or insolvency, they to have no power over the property beyond its legal vestment for conveyance, &c., but to depend on their mother during her life to do for them what may be proper, and after her decease to receive its income, and after their decease their heirs."

Testator survived his wife.

Held, that (subject to making a due provision for *D.*) *J.* and *A.* were jointly entitled to the real estate in fee, and to the personal estate for life (the Court declining to decide who would be entitled to the personal estate after the death of *J.* and *A.*)

Dunk v. *Fenner* (1) disapproved.

JOSEPH HERRICK, by his will, dated the 15th of July, 1846, left all his property, real and personal, freehold and copyhold, and of every kind whatsoever, to "my afflicted child, *Douglas Herrick* (since found a lunatic by inquisition), and to his mother, she to hold all in trust for him, with power to appropriate such sums as may not be necessary for her own proper support and his, to her other son and daughter, *John* and *Anne*, but so that they are employed for their support and maintenance, and not to be risked in any way that would involve the destruction of the capital. And I direct that whatever may be preserved till the decease of my wife be so placed in trust as that my afflicted child may always be provided for, and my son *John Douglas Herrick*, and my daughter *Anne Douglas Barrell*, both of which I appoint trustees to this my will, together with my wife, *Ann Herrick*, that they may have a voice in such arrangements as may be needful, but in case of bankruptcy or insolvency, in either case they to have no power over the property beyond its legal investment for conveyance, &c., but to depend on their mother during her life to do for them what may be proper, and after her decease to receive its incomes, and after their decease their heirs."

The testator died in January, 1865, his wife having pre-deceased him.

The bill was filed by the testator's son *John* for administration of the estate, and the question, upon further consideration, was, what interest was taken by the testator's children under this will?

Mr. *C. Chapman Barber*, and Mr. *G. N. Colt*, for the Plaintiff, contended that he and his sister, Mrs. *Franklin*, were, subject to

(1) 2 Russ. & My. 557.

their making a due provision for their lunatic brother, *Douglas Herrick*, jointly entitled to the real estate in fee, and took a joint life interest in the personal estate which was afterwards given to their heirs as *personæ designatæ*: *De Beauvoir* v. *De Beauvoir* (1); *Gwynne* v *Muddock* (2).

Mr. *Pearson*, Q.C., and Mr. *A. Dixon*, for Mrs. *Franklin* (testator's daughter *Anne*), contended that the gift of real and personal estate was indivisible, and that as there was a plain intention in the testator that the real and personal estate should go together, the words must receive the same construction as to both estates, and accordingly, that after providing for *Douglas Herrick*, the testator's children, *John* and *Anne*, took the personal estate absolutely: *Dunk* v. *Fenner* (3).

[The VICE-CHANCELLOR referred to *Knight* v. *Ellis* (4), and *Ex parte Wynch* (5), where the decision of *Knight* v. *Ellis*, in favour of a life interest only upon a gift of personal estate to *A.* for life, and after his death to his issue male, was treated as binding.]

The words "after their decease their heirs" did not necessarily imply a gift over, but, taken in connection with what preceded, might mean that if *John* and *Anne* predeceased *Douglas*, their heirs were to act as trustees for him.

Mr. *Eddis*, and Mr. *Plummer*, for *Douglas Herrick*, contended that the whole of the property was given to him. The object of the testator to provide for him being clearly expressed by the distinct gift in the first instance (stopping at the words "may always be provided for"), the subsequent clause, by which the ambiguity was created, must be omitted from the gift, and construed as a mere appointment of trustees: *Pushman* v. *Filliter* (6).

Mr. *C. C. Barber*, in reply:—

Dunk v. *Fenner* has been distinctly overruled by *Ex parte Wynch*.

(1) 15 Sim. 163; 3 H. L. C. 524.
(2) 14 Ves. 488.
(3) 2 Russ. & My. 557.
(4) 2 Bro. C. C. 570.
(5) 5 D. M. & G. 188.
(6) 3 Ves. 7.

V.-C. G. 1868 HERRICK v. FRANKLIN.

SIR G. M. GIFFARD, V.C.:—

I think the construction contended for by Mr. *Barber* is the correct one, viz., that *J. D. H.* and *A. D. F.* took a joint estate in fee in the real estate, and took a joint life interest in the personal estate, subject only to their making proper provision for their lunatic brother. I am not now called upon to decide who would be entitled to the testator's personal estate after their deaths. The only difficulty was that raised by *Dunk* v. *Fenner* (1); but I cannot assent to such a proposition of law as that where real and personal estate are blended the personalty goes as the realty. Such a proposition is, I think, bad law, and authority is the other way. There is no authority for holding that, because the rule in *Shelley's Case* (2) applies to real estate, it is to be applied to personal estate also. *Forth* v. *Chapman* (3) decides that the same words, when applied to different subjects, may bear a different construction. When *Dunk* v. *Fenner* was decided, the rule laid down in *Knight* v. *Ellis* (4) was conceived not to be good law. The declaration will be, that (subject to making a due provision for *Douglas Herrick,*) *J. D. Herrick,* and *Anne D. Franklin,* are jointly entitled to the real estate in fee and to the personal estate for life. Whether their heirs are entitled to the personal estate must remain for future decision.

Solicitors: Messrs. *Preston & Dorman;* Messrs. *Poole & Gamlen;* Messrs. *Nethersole & Speechly.*

(1) 2 Russ. & My. 557.
(2) 1 Rep. 219.
(3) 1 P. Wms. 664.
(4) 2 Bro. C. C. 570.

In re STEVENS' WILL.

V.-C. G.
1868
July 29

Will—Devise by Mortgagee—Gift of Legacies followed by general Devise of Realty—Legal Estate in Mortgage held to pass.

A testatrix directed her just debts to be paid. She then gave pecuniary legacies, and gave all the rest, residue, and remainder of her real and personal estate and effects to *J. T.*, for her own absolute use and benefit:—

Held, that although by these dispositions the testatrix's own real estate was charged with debts and legacies, an estate of which she was mortgagee was not excepted from the residuary devise.

THIS was a Petition under the *Trustee Act*, 1850, for the appointment of a person to convey in the place of the heir of a mortgagee, who could not be found.

M. A. E. Stevens, being mortgagee in fee of a copyhold, made a will, dated the 31st of May, 1850, which contained this clause:—"I direct all my just debts to be paid as soon as conveniently can be after my death." The testatrix then specifically disposed of a sum of £2000 Bank Annuities, and gave several general pecuniary legacies, and continued:—"And as to all the rest, residue, and remainder of my real and personal estate and effects, I give and devise the same unto my friend, *Jane Tozer*, for her own absolute use and benefit."

The testatrix died in 1851, and her customary heir could not be found. Her executors and the persons entitled to the equity of redemption having agreed to sell the mortgaged estate, the purchaser took the objection, that the legal estate did not pass by the will. This Petition was therefore presented; it being arranged that if the Court considered the estate to have passed by the devise, the purchaser should pay the costs of the Petition.

Mr. *C. Hall*, for the Petitioners:—

An order is unnecessary. The words "own absolute use and benefit" will not exclude a mortgaged estate from a general devise: *Lewis* v. *Mathews* (1). Nor will the direction to pay debts, for it means only pay debts out of such property as I can subject to them. Nor will the charge of legacies have that effect,

(1) Law Rep. 2 Eq. 177.

V.-C. G. 1868 *In re* STEVENS' WILL.

for the same reason applies. The tendency of the Courts lately has been against excluding mortgaged estates from general devises: *Rippen* v. *Priest* (1), where it was held, in opposition to some older cases, that a gift of "securities for money," subject to payment of debts, would pass the legal estate in a mortgaged property.

Mr. *Cadman Jones*, for the purchaser:—

Where a testator gives pecuniary legacies, and then disposes of "the rest, residue, and remainder" of his real and personal estates, the land is charged with the legacies, on the ground that "rest, residue, and remainder" means what remains after payment of legacies: *Cole* v. *Turner* (2); *Greville* v. *Browne* (3). Now, a gift of "the rest, residue, and remainder, after payment of legacies," would not pass a mortgaged estate: *Roe* v. *Reade* (4); *Doe* v. *Lightfoot* (5); and it is immaterial whether the deductions which make it a "residue" are expressed or understood. "Securities for money" seems, *ex vi termini*, to include a mortgage, and cases turning on those words are inapplicable.

SIR G. M. GIFFARD, V.C.:—

This is not the case of a mere trust estate, but of the legal estate in a mortgage, the beneficial interest in which mortgage was vested in the testatrix.

The charge of legacies was the point insisted on as being a reason why the legal estate in this mortgaged property should not pass.

I quite agree that in this will there is enough to charge both the debts and legacies on the testatrix's own real estate, but if the charge of debts would not prevent the legal estate in the mortgaged property passing, so neither would the charge of legacies. The modern authorities have extended the cases in which the legal estate in a mortgage has been held to pass.

Here, subject to the charge of debts and legacies, there was an absolute gift to *Jane Tozer*. I am not precluded by authority from holding that the legal estate passes in this case; and I do not

(1) 13 C. B. (N. S.) 308.
(2) 4 Russ. 376.
(3) 7 H. L. C. 689.
(4) 8 T. R. 118.
(5) 8 M. & W. 553.

V.-C. G. 1868 *In re* STEVENS' WILL.

hesitate to say that, in a case such as this, good sense and convenience require that a beneficial gift should carry the legal estate in a mortgage as an incident, and a useful and necessary incident, to the beneficial ownership. There may be cases where a trust estate would not pass, and yet there would be a plain intention that the legal estate in a mortgage should pass.

I am of opinion, that on this will there was an intention that the legal estate in the mortgage should pass, and there is nothing to rebut this intention.

There will be no other order than that, it appearing to the Court that the legal estate in the mortgaged property passed by the will, let the Respondent pay the costs of this Petition.

Solicitors: Messrs. *Bridges, Sawtell, & Co.*

In re WELLS' ESTATE.

V.-C. G. 1868 *May* 25.

Will—Illegitimate Children—Designatio Personæ.

Testator, by his will, after a gift to his son *T.* (who was illegitimate,) directed the division of his estate into seven parts, one of which was given to his widow, and after her death to "such of his children to whom the other six shares were given." As to those six shares, the direction was to pay them "among all my children living at my decease, except my son *T.*"

Testator left seven children of whom five were legitimate, two (*T.* and *A.*) illegitimate:—

Held, that *A.* was not entitled to a share as one of testator's children.

THOMAS WELLS, by will, dated the 1st of May, 1830, after certain specific devises and bequests to "my son *Thomas*," directed his trustees to convert his real and personal estate, and divide the residuary proceeds into seven equal parts, one of which was given to his widow for her life, and after her death to be divided equally among "such of his children to whom the other six shares were given." As to those six shares, the trustees were directed to pay the same "among all my children living at my decease (except my son *Thomas*) to be equally divided among them as tenants in common."

Testator died in March, 1835, leaving his widow and seven

V.-C. G. 1868 *In re* Wells' Estate.

children, five of whom were legitimate, and two (*Thomas* and *Ann*) were illegitimate.

After the death of the testator, *Ann* had been paid one of the sixth parts of the testator's residuary estate; and she had joined with two of the other children in executing a mortgage of the seventh part, in which the widow took a life interest, and in this deed she was treated as entitled to share as a child of the testator.

The widow having died, the question upon the present Petition was, whether *Ann*, who had died without leaving any personal representative, was, though illegitimate, sufficiently designated as a child of the testator to entitle her to share with the other children in the division of the widow's seventh (the fund in Court).

Mr. *W. Renshaw* and Mr. *E. Thurstan Holland*, for representatives of two of the legitimate children, contended that *Ann* was excluded, as legitimate and illegitimate children could not both take under the same description unless the illegitimate child was expressly pointed at as *persona designata*: *Cartwright* v. *Vawdry* (1); *Wilkinson* v. *Adam* (2). The mention by testator of *Thomas* as his son, so far from assisting the claim on behalf of *Ann*, shewed that the testator recognised *Thomas* as his child, and not *Ann*. They also cited *In re Standley's Estate* (3).

Mr. *B. B. Rogers*, for persons in the same interest.

Mr. *Wickens*, for the Crown (representing *Ann*, who died without leaving any legal personal representative) contended that *Ann* was entitled to a share. The testator had shewn his intention to include children, illegitimate as well as legitimate, under the word "children," first, by the reference to *Thomas*, who was illegitimate, as one of his children, and, by his special exception, out of the class; and, secondly, by the division of the fund into six shares, which (*Thomas* being excepted by name) could only be satisfied by including *Ann*. Further than this, *Ann* had always been treated in the distribution of the estate and in the mortgage as entitled to a share.

Sir G. M. Giffard, V.C.:—

I cannot distinguish this case from *Cartwright* v. *Vawdry* and *Wilkinson* v. *Adam*. There is no such *designatio personæ* as to

(1) 5 Ves. 530. (2) 1 V. & B. 422. (3) Law Rep. 5 Eq. 310.

V.-C. G. 1868 *In re* WELLS' ESTATE.

enable me to say that *Ann*, being illegitimate, is entitled to share with legitimate children of the testator in a gift to his children, nor does the exception of *Thomas* raise a necessary implication that *Ann* is to take as one of the testator's children. The recital in the mortgage deed, which was not executed by all the children, cannot have the effect of binding them to an admission that *Ann* was entitled. The fund must therefore be divided in fifths among the testator's legitimate children.

Solicitors: Messrs. *Flux, Argles, & Rawlins;* Messrs. *Surr & Gribble;* Messrs. *Dyne & Harvey;* Messrs. *Raven & Bradley.*

In re RANKING'S SETTLEMENT TRUSTS.

V.-C. G. 1868 *June* 12, 27; *July* 30.

*Settlement—Trust for Next of Kin "under and according to" the Statute—Tenancy in Common—Practice—Appointment of Representative—*15 & 16 *Vict. c.* 86*—Letters of Administration dispensed with on payment of Duty.*

By a marriage settlement personal property of the intended wife was settled, the ultimate trust being for such person or persons as at the time of the decease of the wife should be her next of kin "under and according to" the *Statute of Distributions*:—

Held, that the next of kin of the wife took as tenants in common, and not as joint tenants.

Horn v. *Coleman* (1), and *In re Greenwood's Trusts* (2), not followed.

A surviving husband, having mortgaged the reversionary share of his deceased wife in personal estate, died. Upon the death of the tenant for life the mortgagee petitioned the Court; and in the proceedings on the Petition a person was appointed by order of the Court to represent the estates of the husband and the wife, there being no legal personal representative of either.

Upon evidence being produced that the Commissioners of Inland Revenue would be willing to accept a sum equal to administration duty, as from an administrator of the wife, without the production of an actual grant of letters of administration, if succession duty were also paid, and the Petitioner being ready to satisfy these demands,

The Court dispensed with production of letters of administration.

PETITION.

By an indenture dated the 10th of November, 1821, being a settlement executed upon and prior to the marriage of *Robert Ranking* and *Mary Woodhams*, it was declared that the trustees

(1) 1 Sm. & Giff. 169. (2) 31 L. J. (Ch.) 119.

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should stand possessed of certain stocks and funded property formerly belonging to *Mary Woodhams*, and then lately transferred by her to the trustees, upon trust after the death of husband and wife, and upon failure of children, and in default of appointment by *Mary Woodhams* (both of which events happened), as follows:—

"For such person or persons as at the time of the decease of the said *Mary Woodhams* shall be her next of kin under and according to the statute made for the distribution of the estates of persons dying intestate, but exclusively of the said *Robert Ranking*, his executors, administrators, or assigns, or any person or persons claiming under him or them."

Mary Ranking died on the 29th of September, 1864. Her next of kin at her death were her sisters *Louisa Woodhams*, *Eleanor*, wife of *Benjamin Munn*, and *Ann*, wife of the Rev. *William Stopford*.

Mrs. *Munn* died on the 28th of December, 1833; *Louisa Woodhams* died on the 2nd of March, 1834; Mrs. *Stopford* died in 1840; and *Robert Ranking* died on the 14th of July, 1867.

The Petitioner, who claimed under a mortgage of one-third of the fund, dated the 21st of June, 1834, made by the surviving husband of Mrs. *Munn*, contended that on the death of *Mary Ranking* her next of kin at her death were entitled as tenants in common.

The Respondents to the Petition were *Philip Rose*, now sole surviving trustee of the settlement; *John Cobbold Aldrich*, the sole legal personal representative of Mrs. *Stopford*; and *Joseph Lowe*, who, by an order of the Court, dated the 11th of June, 1868, had been appointed to represent the estates of Mr. and Mrs. *Munn*, there being now no living legal personal representative of either.

Mr. *Bristowe*, for the Petitioner:—

The case is governed by *Bullock* v. *Downes* (1), which decides that reference to the statute is sufficient to constitute a tenancy in common.

Mr. *Rasch*, for the trustee.

Mr. *Phear*, for *Aldrich*:—

The next of kin take as joint tenants. In *In re Greenwood's*

(1) 9 H. L. C. 1.

Trusts (1) (decided on the 13th of December, 1862) where the gift was to the testator's next of kin, "according to the statute," Vice-Chancellor *Stuart* said "he was of opinion that the next of kin took as joint tenants. The reference by the testator to the *Statute of Distributions* was merely for the purpose of indicating the class who were to take. Had the gift been to those 'who would be entitled according' to the statute, the case would have been different. He had considered the authorities on the question in *Horn* v. *Coleman* (2), and saw no reason for altering the opinion he had there expressed." In *Bullock* v. *Downes* (3) (which was decided on the 24th of July, 1860) the words "entitled thereto by virtue of the Statutes of Distribution" occurred, and though it does not appear that *Bullock* v. *Downes* was cited to His Honour in *In re Greenwood's Trusts*, the distinction is sufficiently pointed out.

In *Horn* v. *Coleman* (4), where the words were "be entitled thereto," Vice-Chancellor *Stuart*, in 1853, pointed out the same principle. He said: "If the language of the gift refers simply to the statute to ascertain the individuals, without referring to the statute as defining the title, the legatees will take as joint tenants. But that rule cannot govern this case, because the testator refers to the statute, not only as denoting the persons who are to take, but says they are to take according to the title given by the statute."

Lord *Campbell's* remarks (5), Lord *Brougham's* (6), and Lord *Kingsdown's* (7), are all consistent with this view, for they are all speaking of a case of a gift to persons entitled by virtue of the statute. Lord *Kingsdown* admits Vice-Chancellor *Stuart's* rule, that if the reference to the statute is for the purpose of ascertaining "only the object, and not the measure" of the gift, the parties will not take according to the statute, to be a sound one.

If ever there was a case where the intention was to ascertain only the object, and not the measure of the gift, it exists here.

Mr. *A. E. Miller*, for *Lowe*.

Mr. *Bristowe*, in reply:—

The report of *Bullock* v. *Downes* was not published till 1863. If

(1) 31 L. J. (Ch.) 119.
(2) 1 Sm. & Giff. 169.
(3) 9 H. L. C. 1.
(4) 1 Sm. & Giff. 169, 173.
(5) 9 H. L. C. 14.
(6) Ibid. p. 17.
(7) 9 H. L. C. p. 30.

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it had been brought before the Court, *In re Greenwood's Trusts* (1) it could not have been decided as it was.

This is the case of a settlement, and the object of the phraseology was to exclude *Robert Ranking*. That may account for the word "entitled" not occurring. But "under" must mean "entitled under."

SIR G. M. GIFFARD, V.C.:—

I confess I cannot distinguish this case from *Bullock* v. *Downes* (2).

The conclusion I draw from that authority is, that where, either in a will or a settlement, there is a reference to the statute, the statute regulates the nature of the interest as well as the persons who are to take under it. That must be the rule, unless there are words in the instrument which exclude its operation.

Here there appears nothing to exclude the operation of the rule; for I cannot draw a distinction between the expression "under and according to" and "entitled by virtue of."

I must therefore hold that this is a tenancy in common, and not a joint tenancy.

July 30. This matter was spoken to on minutes.

The Registrar, in reciting in the preamble to the order the documents "upon the reading of" which the order purported to be made, had inserted amongst the rest "the letters of administration of the estate and effects of" Mr. and Mrs. *Munn*. *Joseph Lowe* had been, by the order, appointed to represent the estates of Mr. and Mrs. *Munn*, "for all the purposes of the Petition," under the 44th section of the 15 & 16 Vict. c. 86 (3).

(1) 31 L. J. (Ch.) 119.

(2) 9 H. L. C. 1.

(3) Section 44 is as follows:—"If in any suit or other proceedings before the Court it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit, either specially, or generally by public advertisements; and the order so made by the said Court, and any orders consequent thereon, shall bind the estate

It appeared that *Benjamin Munn*, the mortgagor, did not take out administration to his wife's estate; but after his death one of his daughters, on the 24th of January, 1851, obtained letters of administration of his estate, and thereupon had granted to her, as the administratrix of her father, letters of administration to the estate of her mother. This daughter was dead, and since her death no other administration to the estate either of Mr. or Mrs. *Munn* had been obtained.

It was also deposed to, as a matter of rumour, that the rest of the *Munn* family were out of the jurisdiction.

Mr. *Bristowe* mentioned the matter, and asked the Court, having power so to do (1), to dispense with the necessity of the Petitioner taking out letters of administration, provided the payment of the duty were provided for. If the Petitioner were driven to procure letters of administration, he would not know whom to cite, and the expense and delay would be so great that the order would be practically useless to him.

It was also stated that, in accordance with a suggestion made by His Honour, an interview had been obtained with the Comptroller of the Legacy and Succession Duty Department. Upon having the circumstances explained to him, the Comptroller had directed the applicants to say that the Commissioners of Inland Revenue would be willing to accept, without the production of a formal grant of letters of administration, a payment equal to the administration duty payable by an administrator of *Eleanor Munn* on the value of her share at the death of *Robert Ranking*, the tenant for life; but that there must also be paid succession duty, assessed (inasmuch as *Benjamin Munn* did not take out letters of administration to his wife's estate, or pay the duty on the then value of her vested reversionary interest) on the full present value of Mrs. *Munn's* share in the fund.

These claims the Petitioner was ready to satisfy, and to pay the

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of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court."

(1) See note (3), *ante*, p. 604.

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extra costs incident to, and consequent upon, the payment of the duties.

The Court was accordingly asked to allow the recital relating to the production of these two letters of administration to be struck out of the minutes.

Mr. *A. E. Miller*, for the representative.

THE VICE-CHANCELLOR said that upon the production of an affidavit, verifying the statements that had been made, the recital might be struck out of the order; the Court being willing under the circumstances to dispense with letters of administration.

Solicitors for the Petitioner: Messrs. *Finch & Finch.*

Solicitors for the Respondents: Messrs. *Walters, Young, & Walters;* Messrs. *Pyke & Irving*, agents for Mr. *J. M. Pollard, Ipswich.*

V.-C. G. 1868 — *July* 24.

AVERY *v.* GRIFFIN.

Specific Performance—Feme Covert—Trust for Sale.

A *feme covert*, one of several devisees in trust for sale, cannot bind herself to convey the estate, and a bill by the purchaser to enforce specific performance of a contract by such trustees, dismissed.

8 Ch. Ch. 422-8 435

THIS was a suit for specific performance of a contract for the sale to the Plaintiff of the *Windmill Hill* estate.

The estate was put up for sale by public auction, by the trustees of the will of the Rev. *John Griffin*, and the question was, whether the contract was invalidated by the fact that one of the trustees had become, since her appointment, a married woman.

The facts were as follows:—

John Griffin, by his will, dated the 20th of March, 1833, as to all his real estates and the residue of his personal estate, gave, devised, and bequeathed the same unto and to the use of *John Stephenson* and *Charles Vigne*, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust that the said trustees or trustee for the

time being should, with all convenient speed after his (testator's) death, sell his residuary personal estate, and should also absolutely sell and dispose of all his real and leasehold estates, either together or in lots, by public sale or private contract, to any person or persons willing to purchase the same, for such price or prices as to the said trustees or trustee for the time being should seem reasonable; and for facilitating such sale or sales should make and execute all such contracts, acts, deeds, and assurances as the said trustees or trustee for the time being should think proper; and should, out of the moneys so to arise from such sale or sales, callings-in, and conversions, pay the testator's debts, and funeral and testamentary expenses, and legacies, and, subject thereto, stand possessed thereof upon the trusts and for the purposes thereinafter declared; and the said testator appointed his widow, and the said *John Stephenson* and *Charles Vigne*, executors of his will.

The will contained a trustees' receipt clause.

By a codicil, dated the 25th of August, 1849, the testator revoked the appointment of *Stephenson* and *Vigne* as his executors, and appointed in their stead his sons *John Henry* and *Arthur Griffin*, and his daughter *Julia Anne Griffin*, to be trustees and executors and executrix of his will. By a subsequent codicil, made in 1852, testator devised and bequeathed all his real and personal estate to *John Henry*, *Arthur*, and *Julia Ann Griffin*, their heirs, executors, administrators, and assigns, according to the nature of the same respectively, upon such trusts, and for such intents and purposes, and with like powers, as in the will was declared of and concerning the same.

Testator died on the 21st of June, 1852.

In April, 1854, *Julia Anne Griffin*, was married to the Defendant *William P. Hulton*.

On the 30th of July, 1867, the Defendants, *John Henry* and *Arthur Griffin*, and Mrs. *Hulton*, caused the *Windmill Hill* estate (being part of the devised estates), to be put up for sale by public auction. The Plaintiff was the highest bidder, and became the purchaser, and paid £920 as a deposit on his purchase. The memorandum of agreement was signed on behalf of *John Henry Griffin*, *Arthur Griffin*, and *Julia Anne Hulton*, by Mr. *John Arnold*,

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solicitor, who described himself as the vendors' agent. Up to the 6th of October, 1867, the sale was treated as binding by Defendants, acting by Mr. *Arnold*, as their solicitor; but on a change of solicitors, Defendants, being advised that the sale was at an undervalue, declined to be bound by the agreement, on the ground that Mrs. *Hulton*, by her marriage since her appointment as trustee, had become incapable of entering into any contract for sale of the estate, and consequently that there was no agreement binding upon them (the vendors).

The Defendants also insisted by their answer, that although *Arnold* was instructed by them ("so far as she, Mrs. *Hulton*, was by herself alone competent so to do, which we submit and insist she was not") to conduct the sale, he was not in any other manner authorized to sign the memorandum of agreement. Mr. *Hulton* (who was made a Defendant), also stated that he had never given any authority to *Arnold* to sign such, or any other memorandum.

Under these circumstances the bill was filed on the 28th of December, 1867, for the purpose of enforcing specific performance of the contract.

The Defendants, on the grounds already stated, insisted by their answer that no agreement for sale of the estate to Plaintiff had been entered into, and that Plaintiff could not maintain the suit, and they relied upon the *Statute of Frauds*, and claimed the same benefit as if they had pleaded it.

Mr. *Druce*, Q.C., and Mr. *Archibald Smith*, for the Plaintiff:—

A *feme covert* trustee for sale is bound to carry out her contract to sell the estate. "The reasons upon which her disabilities are founded are her own interest, or her husband's, or both. Where these are not concerned she possesses as much legal capacity as if she were perfectly *sui juris*": *Lewin* on Trusts (1). At common law, if land were vested in a *feme covert* upon condition to enfeoff another she might execute the feoffment by her own act without the intervention of her husband: *Daniel* v. *Ubley* (2). In the Yearbook, 10 Hen. 7 (3), it was adjudged that a *feme covert* executrix might sell even to her husband, and the three feoffees who

(1) Page 29. (2) Sir *Wm. Jones*, 137 · Latch. 134.
(3) Page 20.

refused to make feoffment were sent to the *Fleet*. *Coke* also says:— "And so a *feme covert* that hath power to sell land by will may sell the same to her husband, because they are but instruments for others and the estate passeth from the feoffor or devisor" (1). So where there is a trust for sale, the testator has, in effect, made an equitable devise in favour of the purchaser, which takes effect when the trustees have entered into the contract. It is settled law that a married woman can exercise a power collateral, "and although there was an interest, such an execution should be good:" *Godolphin* v. *Godolphin* (2). By analogy, she can execute a trust for sale without a deed acknowledged, and the Court of Common Pleas would dispense with the assent of her husband.

Upon the question of the authority in *Arnold*, if *Arnold* was authorized (as it is admitted he was) to conduct the sale, and the signature of the auctioneer employed by him would have been binding on the vendors, *à fortiori* the signature of *Arnold* himself, their immediate agent, would bind them. As to undervalue, no evidence had been adduced by the Defendants.

Mr. *Kay*, Q.C., and Mr. *Nalder*, for the Defendants, were heard upon the question of costs only. They submitted that the suit had been improperly instituted after a distinct warning of this insurmountable objection to the contract had been given to the Plaintiff.

SIR G. M. GIFFARD, V.C.—

I am of opinion that the Defendant, Mrs. *Hulton*, could not, by contract, bind herself to convey the estate devised to her in trust for sale, and therefore the bill must be dismissed, but without costs, and without prejudice to any action.

Solicitors: Messrs. *Church, Sons, & Clarke*, agents for *James & Griffin, Birmingham*; Messrs. *Steele & Sons*.

(1) Co. Litt. 187 b. (2) 1 Ves. Sen. 21.

V.-C. G. *In re* DEVON AND SOMERSET RAILWAY COMPANY. (1.)

1868

June 25.

Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127, *s.* 9)—*Scheme of Arrangement—Scire Facias—Property of Company—Companies Clauses Act*, 1845.

SC Post 616
2 Ch D. 339

After publication in the *Gazette* of notice of the filing of a scheme of arrangement by a railway company under the *Railway Companies Act*, 1867, creditors of the company will not be allowed, without first obtaining leave of the Court, to issue execution upon a writ of *scire facias* obtained pursuant to sect. 36 of the *Companies Clauses Act*, 1845, against shareholders of the company; the amount of capital remaining to be paid, in respect of which the *scire facias* has been obtained, being property of the company within sect. 9 of the Act of 1867.

THIS was a motion on behalf of the *Devon and Somerset Railway Company* that the *Ilfracombe Railway Company* might be restrained from issuing any execution, attachment, or other process, against the property of the *Devon and Somerset Railway Company*, and in particular might be restrained from issuing any execution or other process against the property or persons of *William Webber* and *H. G. Moysey*, shareholders in the *Devon and Somerset Railway Company*, or either of them, against whom the *Ilfracombe Railway Company* had obtained judgment, by virtue of writs of *scire facias* issued upon a judgment obtained by them against the *Devon and Somerset Railway Company* for unpaid calls.

On the 8th of August, 1866, the *Ilfracombe Railway Company* recovered judgment against the *Devon and Somerset Railway Company* for £10,750 1*s.* 2*d.*, and on the 9th of May, 1868, the *Ilfracombe Railway Company*, in exercise of their rights under the *Companies Clauses Act*, 1845 (8 Vict. c. 16), s. 36, caused two writs of *scire facias* to be issued out of the Court of Common Pleas against *Henry Gorges Moysey* and *William Webber*, both of whom were shareholders in the *Devon and Somerset Railway Company*; such *scire facias* being issued against them in respect of shares held by them in the *Devon and Somerset Railway Company*, not then paid up.

The scheme in this matter was filed on the 5th of March last and duly advertised as required by the statute, and was confirmed by an order dated the 30th of May last.

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The *Ilfracombe Railway Company* having obtained judgment against *Moysey* and *Webber* under the *scire facias*, on the 17th of June gave notice that, unless previously restrained by the Court, they would at the expiration of ten days lodge executions against the Defendants (*Webber* and *Moysey*) upon the judgments.

Under these circumstances the *Devon and Somerset Railway Company* moved, under the *Railway Companies Act*, 1867, for an injunction to restrain the issue of any execution, attachment, or other process against the property of the company, and against the property and persons of *Moysey* and *Webber*, upon the judgments obtained by the *Ilfracombe Railway Company* by virtue of the writs of *scire facias*. The motion was based upon sect. 9 of the Act, which provides, that after publication in the *Gazette* of notice of the filing of the scheme "no execution, attachment, or other process against the property of the company shall be available without leave of the Court, to be obtained on summons, or motion in a summary way"—no such leave having been obtained by the *Ilfracombe Railway Company*.

Mr. *W. M. James*, Q.C, and Mr. *M. Cookson*, in support of the motion:—

The issue of execution against the shareholders upon the judgments obtained in the *scire facias* actions, is a process against the property of the company, which, by sect. 9 of the *Railway Companies Act*, 1867, after publication in the *Gazette* of notice of the filing of a scheme of arrangement under the Act, is not available without leave of the Court. Unpaid calls being a debt due from the shareholders to the company, are property of the company—"not immediately, but which may be called up by the directors at their discretion": *per* Lord Justice *Turner*, in the *British Provident Life and Fire Assurance Society* (1). As soon as a man contracts to take shares, he incurs a liability to the company, and the moneys paid upon calls are paid in discharge of an antecedent liability which was complete at the time when the shares were issued: *Williams* v. *Harding* (2); *Companies Act*, 1862, s. 75.

These shareholders against whom it is intended to issue execu-

(1) 33 L. J. (Ch.) 535-8. (2) Law Rep. 1 H. L. 9. 27.

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tion upon the judgment in the *scire facias* actions are in the position of *quasi* trustees, or sureties for the company to the extent of their unpaid calls. Supposing they had set apart certain specific funds of their own for payment of these calls, can it be said that taking the money so set apart is not taking the property of the company? In any view shareholders are debtors of the company, and the unpaid calls are *choses in action* of the company, *debitum in præsenti solvendum in futuro*, and it makes no difference that the money is in the hands of the shareholders and has not been actually transferred by them into the coffers of the company. The case is analogous to that of money lying at call in a bank, which though not in the actual possession of the customer is clearly his property. Therefore the attachment of this money in the hands of the shareholder, who, under his contract, is bound to pay it over to the company when a call shall be made, is an attachment of moneys of the company, and an execution against the property of the company which the *Railway Companies Act* does not permit without leave of this Court.

Mr. *Wickens*, and Mr. *Bridge*, for the *Ilfracombe Railway Company*:—

The jurisdiction of the Court to restrain the simple contract creditors of the company from exercising their rights arises entirely under the 9th section of the *Railway Companies Act*, 1867, and is therefore limited by it; and it is for the parties moving to satisfy the Court that unpaid calls and share capital not as yet called up are property of the company within that section. Sect. 36 of the *Companies Clauses Act* distinguishes between that which we are seeking to affect, and property and effects of the company which we must shew to be non-existent before we can obtain the remedy against the shareholder given by that section.

In no sense can the proceedings by which we are seeking to enforce our judgments against the shareholders be said to be an attachment or process against the property of the company, and therefore this Court has no jurisdiction to grant an injunction. No doubt it is an execution against the shareholder in respect of the unpaid calls; but it is an execution against the shareholder (and so treated in the *Companies Clauses Act*, ss. 36, 37) as

distinguished from an execution against the property of the company. Can it be said that the persons of these shareholders are property of the company within the meaning of sect. 9? and yet the notice of motion seeks to restrain execution against their persons as well as their property. The issuing of the writ of *scire facias*, which is treated by the *Companies Clauses Act*, s. 36, as a proceeding against the shareholder only, is a matter of discretion: *Addison* v. *Tate* (1); and the existence in a Court of Common Law of this discretion as to proceedings against the shareholder affords a reason why the discretion of this Court should have been limited by the *Railway Companies Act*, sect. 9, to proceedings against the property of the company. When, after the advertisement of a scheme, creditors are seeking to enforce their rights against the property of the company only, they must obtain leave from this Court. But when, as here, the proceeding (from the want of available property of the company) is against the shareholders, then the necessity of applying to this Court for leave does not exist, the discretion of granting or refusing the remedy by *scire facias* being already vested in the Courts of Common Law. With regard to the unpaid capital of a company, it is in the discretion of the directors to make a call or not. If they think fit to make a call it becomes a debt to the company, and attachment might issue for the amount, but until the call is made there is no debt, and there is nothing in the hands of the shareholders capable of being reached by the *scire facias*, which upon any reasonable construction can be said to be property of the company within the meaning of sect. 9 of the Act of last session.

SIR G. M. GIFFARD, V.C.:—

I have not to decide in this case whether or not I should give leave to the *Ilfracombe Railway Company* to go on with their proceedings and issue execution, and therefore any order I may make will leave it open to the company to come here and ask for leave to issue execution. The Act of Parliament, one must confess, is clumsily drawn, but it is not so clumsy but that I may do what I infer to be directed by it. Beyond doubt, unpaid capital is

(1) 24 L. J. (Ex.) 249.

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the property of the company, and I do not think it matters whether calls have been made or not. Then, defining it strictly, the *scire facias* may be called a process against a shareholder in respect of the property of the company, for the purpose of getting the property of the company; and if so, the words of sect. 9 are, I think, sufficient. The object of the Act of 1867 clearly was to prevent a multiplicity of actions, and the increase of costs, in order that railway companies might have time to see whether they could arrange with their creditors. By the construction I am asked to put upon sect. 9, just observe how very much the Act would be evaded, because in many cases unpaid capital forms almost all the substantial property of the company. Upon that construction, although there was notice of a scheme, if there happened to be a judgment against the company, and it got to that point at which a *scire facias* might be applied for, the scheme would have no operation. I do not think that can be the intent of the Act, and although it is clumsily drawn, and the framer probably did not think of these writs of *scire facias*, I am of opinion that the words of sect. 9 enable me to do all that is now asked. It says: "after publication of such notice no execution, attachment, or other process against the property of the company shall be available without leave of the Court." It is not going very far to say that these words may mean process for the purpose of getting the property of the company, and this is a process for that purpose beyond all question, and the thing that would be got by force of that process would be the capital of the company, and nothing else.

I do not think the matter is helped by the argument founded on sect. 36 of the *Companies Clauses Act*, as where it applies to property and effects of the company it obviously means property and effects in the hands of the company, and liable to execution. It does not say that unpaid capital is not property of the company; but it does say that, if there are no effects and property in the hands of the company, and no assets available, creditors may go against the shareholders. Whatever is levied upon the shareholder is, *pro tanto*, an abstraction from the capital of the company, and, by consequence, the creditors are taking the property of the company. I think, therefore, this execution must be restrained; but

undoubtedly it must be simply in the form of restraining it from going further without leave of the Court. There may be all sorts of things in the scheme which might induce one to say that execution should issue. The order will be to restrain any execution, attachment, or other process on the judgments in the *scire facias* from proceeding further without leave of the Court, but without prejudice to any application that may be made for leave. I have no jurisdiction under the Act to give any costs.

Solicitors: Messrs. *Combe & Wainwright;* Messrs. *Bircham, Dalrymple, & Co.*

In re DEVON AND SOMERSET RAILWAY COMPANY. (2.)

Railway Company—Scheme—Inrolment—Application by outside Creditors—Suspense of Inrolment pending Motion for leave to file Petition for Rehearing—Railways Act, 1867 (30 & 31 *Vict. c.* 127, *s.* 18)—*General Order of January* 24, 1868, *Rules* 23–28, 35.

Where a scheme of arrangement between a railway company and their creditors had been confirmed, inrolment of the confirmation order was restrained on the application of outside creditors, who had, within thirty days from the date of the order, set down a motion for leave to file a Petition for a re-hearing.

THIS was a motion on behalf of the *Ilfracombe Railway Company*, that the *Devon and Somerset Railway Company* might be restrained from inrolling an order made on the 30th of May, 1868, confirming a scheme of arrangement between the *Devon and Somerset Company* and their creditors, until a motion by the *Ilfracombe Company*, set down before the Lords Justices, for leave to file a petition of rehearing of the case on which the order was made had been disposed of, or until further order.

On the 8th of August, 1866, the *Ilfracombe Company* recovered judgment against the *Devon and Somerset Company* for £10,750 1*s.* 2*d.*, upon which an *elegit* was issued.

On the 5th of March, 1868, a scheme of arrangement between the *Devon and Somerset Company* and their creditors was filed. On the 16th of April a Petition was presented for confirmation.

On the 9th of May, 1868, the *Ilfracombe Company* caused two

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writs of *sci. fa.* to be issued against two of the shareholders of the *Devon and Somerset Company*.

On the 30th of May, 1868, the scheme of arrangement was confirmed, and the thirty days prescribed by the 23rd rule of the Order of the 24th of January, 1868, as necessary to precede inrolment, would expire on the 29th of June.

On the 20th of June, notice of a motion by the *Devon and Somerset Company* to restrain the *Ilfracombe Company* from issuing execution, attachment, or other process, against the company and the two shareholders was signed and served.

On the 23rd of June notice of a motion by the *Ilfracombe Company*, before the Lord Chancellor, for leave to present a Petition for rehearing the Petition of the 16th of April and the order of confirmation, was signed and served. On the 25th of June, the Lords Justices declined to assent to an application on behalf of the *Ilfracombe Company* to bring on this motion out of its turn, and said that the proper course was to apply to the Vice-Chancellor for an order restraining the inrolment of the order.

On the same 25th of June an order was made by His Honour for an injunction restraining the *Ilfracombe Company* from issuing execution or other process upon the judgments in the *sci. fa.* actions. The case is reported (1).

On the 26th of June notice of the present motion was signed and served.

From an affidavit of the secretary of the *Devon and Somerset Company*, it appeared that at the date of the filing of the scheme the *Devon and Somerset Company* were indebted to creditors, exclusive of the *Ilfracombe Company*, in the sum of about £24,000; and that none of these creditors objected to the scheme.

It was stated that the *Ilfracombe Company* were the only outside creditors of the *Devon and Somerset Company* to any considerable amount; and it was deposed that if any stay were made in the inrolment several negotiations which were on foot for raising capital for the completion of the line, for the payment of debts, and for the purchase of land, would fail; and that the consequences would be ruinous to the company, and render the scheme abortive.

(1) *Ante*, p. 610.

Mr. *Pearson*, Q.C., and Mr. *Wickens*, for the applicants:—

The 18th section of the *Railways Act*, 1867, provides that a scheme, when inrolled, is to have the same binding effect as an Act of Parliament. It must be plain that our motion to have the case reheard is made *bonâ fide*. The result of permitting this inrolment, therefore, would simply be to deny us the right to have the case reheard.

The case is within the spirit, though not actually provided for by the terms, of the 24th rule of the Order of the 24th of January, 1868 (1). Here a motion for leave to file a petition of rehearing has been presented, but not heard.

The jurisdiction of the Court under the 35th rule, which provides that the power of the Court to enlarge or abridge the time for doing any act or taking any proceeding shall be the same as in proceedings under the ordinary jurisdiction of the Court, is clear.

We say that the Act and Order do bind the outside creditors to a scheme after it has been confirmed, and there is no doubt we should be irremediably bound by an inrolment: *Barrs* v. *Fewkes* (2).

Mr. *W. M. James*, Q.C., and Mr. *M. Cookson*, for the *Devon and Somerset Railway Company*:—

It has been decided in the *Cambrian Railways Company's Scheme* (3), that outside creditors are not bound by a scheme when matured. These applicants, therefore, cannot be heard on this application. They did not oppose the confirmation, or enter an appearance.

The case is not within the 24th rule; and there is no jurisdiction in the Court to enlarge the time for inrolment under the 35th rule, unless a case be made of *mala fides*, or surprise. Here there is nothing of the kind. All that the applicants allege is, that they supposed the *sci. fa.* proceedings would go on.

(1) Rule 24: "No caveat shall be entered to stay the inrolment of any order for confirming a scheme, but every such order may be inrolled at the expiration of thirty days from the day of the same being pronounced, unless in the meantime a petition for a rehearing shall have been presented, and an order for setting down such Petition obtained and served, such thirty days to be exclusive of vacations."

(2) Law Rep. 1 Eq. 392.

(3) Ibid. 3 Ch. 278.

V.-C. G. 1868 *In re* DEVON AND SOMERSET RAILWAY COMPANY. (2.)

The result of suspending the inrolment will be ruin to the company.

SIR G. M. GIFFARD, V.C.:—

I have had in this case very strong arguments urged before me, to which, if I were hearing the motion before the Lords Justices, or a Petition of rehearing, I should give great weight.

But, really, the only question I have to consider is this:—what will be the effect if I allow this inrolment? Beyond all question if I allow it the motion before the Lords Justices will be at an end and all attempt at rehearing the petition for confirmation of this scheme will be at an end likewise. On the other hand, there are allegations that great mischief will happen to this company if the inrolment is suspended. I can pay no attention to those allegations, because I do not believe that any mischievous consequences will happen by reason of this matter being postponed for a week or a fortnight.

Therefore, the order I have to make is, to postpone the inrolment; and I am clear that I have jurisdiction, because the 35th rule puts the parties in the same position as if this were a suit, and I look upon this as an ordinary application to restrain proceedings pending an application in the Court above; and in that way I have jurisdiction.

The terms of the Act have been fully considered. I wish I could find some way to keep the parties in the same position as they are now, and let the inrolment take place, but I fear I cannot do so. My impression is, that when once you get an inrolment under section 18 the matter is concluded; the scheme has the same effect as an Act of Parliament, and the only question open would be, whether these are parties who are or are not bound. Therefore I make this order; first, because I do not think it will prejudicially affect those who oppose it; and, secondly, because I am certain that if I do not make the order all chance of raising the questions sought to be raised by a rehearing, will be put an end to.

The order will be in the terms of the notice of motion, the applicants paying the costs.

Solicitors: Messrs. *Bircham & Co.*; Messrs. *Combe & Wainwright.*

GUEST *v.* COWBRIDGE RAILWAY COMPANY.

V.-C. G.
1868
July 24.

Judgment—Priorities gained by Date when Writ reaches Sheriff—Lien arises only after Return—Law of Judgments Amendment Act (27 & 28 *Vict. c.* 112).

By the *Law of Judgments Amendment Act* (27 & 28 Vict. c. 112) a judgment creditor has no lien upon the land of his debtor until he has got a return from the sheriff, though he may, after putting the writ in the hands of the sheriff and before the return, have a right to file a bill to remove a legal impediment; and priorities of judgment creditors against lands are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff.

Therefore a judgment creditor subsequent in point of date, but who was the first to place his writ in the hands of the sheriff, and get the lands of the debtor extended under such writ, was held entitled in priority to a prior judgment creditor whose writ was subsequently placed in the sheriff's hands before the lands were extended.

THE Plaintiffs, who carried on business as iron masters, under the firm of *Guest & Co.*, on the 24th of May, 1866, obtained a judgment in the Court of Queen's Bench against the Defendant railway company for £2680, and on the 28th of May, the costs having been added to the amount, judgment was entered up for £2690 13*s.* 10*d.* On the 29th of September, 1866, the Plaintiffs registered their judgment in the Common Pleas. On the 17th of April, 1867, a writ of *fieri facias* was issued, and lodged with the sheriff of *Glamorganshire*, with instructions to levy on the property of the company for the balance (£1817) remaining due upon the judgment.

On the 29th of April, 1867, the Defendant *Maxwell*, as public officer on behalf of the *National Provincial Bank*, obtained judgment against the company for £6000, and on the 15th of May, 1867, a writ of *elegit* was issued upon this judgment, and lodged with the sheriff of *Glamorganshire*.

On the 16th of May, 1867, the Plaintiffs' writ of *fieri facias* was returned by the sheriff, and the return stated that by virtue of the writ the sheriff had caused to be made of the goods and chattels of the company the sum of £617 7*s.* 8*d.*, but that the company had not any more goods or chattels.

On the same day a writ of *elegit* was issued upon the Plaintiffs'

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judgment for the balance due to them, and lodged with the sheriff. On the 31st of May the lands of the company were extended by the sheriff, notwithstanding a protest on the part of the Plaintiffs, on *Maxwell's* writ of *elegit*, and possession was delivered to him. An inquisition was taken on the same day on the Plaintiffs' *elegit*, but the lands, having been already extended and delivered to *Maxwell*, were not delivered to the Plaintiffs (1). Under these circumstances the Plaintiffs had filed their bill, praying a declaration that under and by virtue of the judgment entered up by them on the 28th of May, 1866, they were entitled to a charge upon all the estates and hereditaments of or to which the railway company at the time of entering up such judgment were, or at any time afterwards became, entitled, and also on the rents, tolls, rates, and earnings arising, or to arise, out of the undertaking of the company, and that such charge had priority to any charge that Defendant *Maxwell* might have upon such estates and hereditaments under his judgment and the *elegit* issued thereon.

A motion was made on behalf of the Plaintiffs for a receiver of the rents, tolls, rates, and earnings of the undertaking (the bill alleging, that in case *Maxwell's* judgment should as to the hereditaments extended to him be held to have priority over that of Plaintiffs they would be without remedy at Law or in Equity, except so far as they could obtain satisfaction of their claim by establishing and realizing their lien on the earnings of the undertaking through the medium of a receiver).

On the 18th of July, 1867, this motion was refused by Vice-Chancellor *Wood*, with costs.

The cause now came on for hearing.

Mr. *W. M. James*, Q.C., and Mr. *Bedwell*, for the Plaintiffs:—

Our case is, that nothing that has happened can affect the priority of our charge over that of *Maxwell*. Under 1 & 2 Vict. c. 110, we are entitled, by virtue of entering up and registering our judgment, to a charge upon the lands of the debtor, and that charge is not swept away by anything contained in the *Law of Judgments Amendment Act* (27 & 28 Vict. c. 112).

(1) *In re Cowbridge Railway Company*, Law Rep. 5 Eq. 413.

It will be contended that we have no charge until the land has been actually delivered in execution to us (27 & 28 Vict. c. 112, s. 1). But there is no repeal of 1 & 2 Vict. c. 110, and sect. 5 clearly contemplates the existence of "charges" other than that of the creditor who has had the lands actually delivered to him in execution. Our legal right to get possession of the land would have been just as much impeded under the old law by the delivery in execution of the land to *Maxwell*, it having been held that land cannot be extended under a second writ when possession has been delivered under the first: *Carter* v. *Hughes* (1); and we are entitled to the assistance of a Court of Equity to enforce our priority. In any case the rents and tolls are incapable of actual delivery, and therefore nothing that has taken place before the sheriff can have had the effect, as to them, of transferring our priority to *Maxwell*. In the case of *The Cowbridge Railway Company*, before Vice-Chancellor *Wood* (2), the Petitioner was not only subsequent in obtaining his *elegit*, but also in recovering judgment, and therefore the decision does not apply.

[They also referred to 19 & 20 Vict. c. 97 (*Mercantile Law Amendment Act*, 1856) s. 1.]

Mr. *Kay*, Q.C., and Mr. *A. T. Watson*, for *Maxwell*:—

The Plaintiffs are not entitled to priority, as they have no charge upon the lands. The Act (27 & 28 Vict. c. 112) expressly provides that no judgment entered up after the passing of the Act shall affect any land "until such land have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority," these last words applying to cases where possession cannot be actually taken, as of rents and tolls. The charge, therefore, begins from the inquisition under which possession is delivered, and the sheriff cannot refuse to deliver possession to any one who first presents himself armed with a writ of *elegit*. How, then, can the Plaintiffs, who have not got any charge, claim priority?

[They relied upon *In re Cowbridge Railway Company*; and also referred to *Bull* v. *Faulkner* (3).]

(1) 2 H. & N. 714. (2) Law Rep 5 Eq. 413.
(3) 17 L. J. (Ch.) 23.

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Mr. *Druce*, Q.C., and Mr. *W. Pearson*, for the *Cowbridge Railway Company*:—

The Plaintiffs have entirely mistaken their remedy. They are in the position of *puisne* incumbrancers, and are not entitled, as against the mortgagee in possession, to have a receiver appointed, though they may file their bill to redeem him. The Act 27 & 28 Vict. c. 112, is express that there can be no charge until the lands are delivered in execution, and the Plaintiffs are entirely concluded by *In re Cowbridge Railway Company* (1), being in the same position as the Petitioner there was. It is not the entry up of the judgment, but the delivery of the writ into the hands of the sheriff, that constitutes the turning-point as to priority, and what was decided by Vice-Chancellor *Wood* was that the Petitioner could not obtain the benefit of the statute until he had got rid of the prior *elegit*. Even assuming that their rights under 1 & 2 Vict. c. 110, are unaffected by 27 & 28 Vict. c. 112, the Plaintiffs would not be entitled to the relief sought by this bill. They must first file their bill to redeem, and, as was observed by Vice-Chancellor *Wood* in *In re Cowbridge Railway Company*, "when they have got rid of the prior *elegit*, the obstacle in their way, they can come here by Petition under the statute."

Mr. *W. M. James*, in reply.

SIR G. M. GIFFARD, V.C.:—

The judgment of Vice-Chancellor *Wood* amounted to this, and nothing more, that a creditor who had actually put a writ in the sheriff's hands had the usual equitable right of any other creditor where there was some legal obstacle in his way. He was also of opinion that no person could apply by Petition under the Act unless he had actually got that which was equivalent to being put into possession; that is, a return to the writ actually placed in the hands of the sheriff.

The next thing to consider is what, independently of this statute, are the rights of the parties with reference to writs of *fieri facias* against personal property. Those rights are very plain. First of all, there is no right of any kind until the writ of *fieri*

(1) Law Rep. 5 Eq. 413.

facias is in the hands of the sheriff, and, supposing the sheriff does his duty, the rights are undoubtedly according to the dates at which the writs are put into the hands of the sheriff, and not according to the dates at which the judgments are obtained. In that state of things we have this Act of Parliament. The old law, as we know, was very much altered: first, by giving very extended rights and remedies to judgment creditors as against lands, and then by gradually, from time to time (in several Acts), contracting and cutting down those rights, and ultimately this Act is passed.

The preamble, at all events, is plain enough. It recites that it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes, and recognizances. The object, therefore, is, that there shall be no right until there is a writ in the hands of the sheriff, and that those rights shall take effect according to the delivery of those writs.

The first clause is in these terms: "No judgment, statute, or recognizance to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment, statute, or recognizance." That is plain enough, I think, and it must mean that no judgment creditor can have any right of any kind until he has put the writ into the hands of the sheriff. But it goes further, I think, because, although possibly putting the writ into the hands of the sheriff may give him a right to file a bill to remove a legal impediment, I do not think he has any right in the shape of a lien on the land until he has got a return from the sheriff. That is pretty clear, I think, from the 3rd section, which is: "Every writ or other process of execution, and every such judgment, statute, or recognizance by virtue of which any land shall have been actually delivered in execution, shall be registered in the manner provided by 23 & 24 Vict. c. 38, and no other or prior registration of such judgment, statute, or recognizance shall be, or be deemed, necessary for any purpose" (we know under the old law that registration was necessary to give a lien). "No reference to any such prior registration shall be required to be made in or by a memorandum or minute on the writ or other process of execution which shall be

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left with the senior master of the Common Pleas for the purpose of such registry."

There is a difficulty, no doubt, on sect. 5, as to prior and subsequent claims by judgments or recognizances. There certainly is one state of things to which it may possibly apply; that is, the sheriff may have made a mistake by taking a subsequent writ instead of the first writ. There is also another possible state of things, that the writ may have been executed by a person who took it, and also may have got his return, and taken no further steps in the matter. There is that possible state of things for aught I know, and if the occasion requires it, one may possibly find some means of giving some other meaning to the term "delivered in execution." But I am not required to do that here, because the case is, that a subsequent judgment creditor is the first to put his writ into the hands of the sheriff. The execution of that writ by the sheriff is due, because it is first in his hands. Then we have the prior judgment creditor giving his writ to the sheriff subsequently to the judgment creditor who is subsequent in point of date. I am clearly of opinion that under this Act the priorities, where things are properly done, must be determined according to the date at which the writs are put into the hands of the sheriff. That being so, the Defendant *Maxwell*, and not the Plaintiff, has priority. The bill must be dismissed with costs.

Solicitors: Messrs. *Peachey & Co.;* Messrs. *Vizard, Crowder, Anstie, & Young;* Messrs. *Wilde, Humphry, Wilde, & Berger.*

ABRAHAMS *v.* MAYOR, ALDERMEN, AND COMMONS OF THE CITY OF LONDON.

V.-C. G.
1868
July 21, 24.

City Improvement Act, 1847 (10 & 11 *Vict. c. cclxxx.*)—*Compensation—Separate Interests, Separate Assessment of.*

Upon the construction of sects. 20 and 21 of the *City Improvement Act*, 1847, where separate interests are claimed in the same property it is the right of every person making a separate claim to have a separate assessment by a separate jury of the amount of compensation payable to him. Hence the Corporation of *London* were restrained by injunction from exceeding their statutory powers by proceeding to trial upon a precept by the terms of which the compensation payable to the under-lessee and the various persons claiming under him in respect of their several interests in a house required to be taken by the corporation under the *Holborn Valley Improvement Act*, 1864 (with which the *City Improvement Act*, 1847, is incorporated) would have to be assessed by one jury and in one trial.

THIS was a motion for an injunction to restrain the Defendants, the Mayor, Aldermen, and Commons of the city of *London*, from taking any further proceedings under the precept and notice of trial served upon the Plaintiff, and also from taking possession of Plaintiff's premises until the purchase and compensation-money payable to him should have been separately inquired of, assessed, and ascertained, paid, and deposited, according to the provisions of the *City and Holborn Valley Improvement Acts.*

The Plaintiff was sub-lessee from *William Lamplough*, the lessee from the freeholders (the Corporation of *London*) of No. 88, *Snow Hill*, and No. 1, *Farringdon Road*, in the city of *London*.

Portions of both these houses were occupied by Plaintiff, and the remainder was let out by him to various tenants upon leases for terms short of that which he held. Some of these tenants had themselves granted leases, and the interests represented by the Plaintiff and those claiming under him were eleven in number.

On the 19th of December, 1867, notice to treat for the purchase by the Corporation, for the purposes of the *Holborn Valley Improvement Act*, 1864, of No. 88, *Snow Hill*, and No. 1, *Farringdon Road*, was served on Plaintiff, the notice being directed "To *Henry Abrahams*, and to all and every other person and persons having or claiming any estate or interest in the hereditaments and premises, or any part thereof."

On the 20th of January, 1868, Plaintiff delivered the following statement of the particulars of his claim:—

Name, Residence, Business, or Description of the Person claiming.	Situation and Description of the Property.	Nature of the Estate, Share, or Interest claimed, whether Freehold or Leasehold, &c. &c.	Names of Occupiers, whether Lessees, or yearly, quarterly, monthly, or weekly Tenants, the Rents and Premiums paid, the Terms of Years, and the Periods when the Tenancies commenced.	Particulars of Claim, specifying the Amount claimed for the Value of the Estate or Interest separately from that claimed for Improvements, &c.
Henry Abrahams, glass cutter, and dealer in paper-hangings, &c.	88, *Snow Hill*, and 1, *Farringdon Road*, within the City of *London*.	Leasehold. The premises, 88, *Snow Hill*, are held for a term of twenty-one years from Michaelmas, 1857, at £150 per annum, and for a further term of seven and a half years from Michaelmas, 1878, at £250. The premises, 1, *Farringdon Road*, are held for a term of twenty-one years from Lady Day, 1865, at £180 per annum. Claimant has been in occupation of these premises since Christmas, 1859. Landlord, Mr. *William Lamplough, Compton Terrace, Islington.*	The claimant occupies the ground floor of 88, *Snow Hill*, part of the floor of 1, *Farringdon Road*, and the whole of the basement under the two premises, for the purposes of his business. He also retains the second, third, and fourth floors of 88, *Snow Hill*, for residential purposes (excepting one room which is let to a weekly tenant), the first floor is let to *David Read* and *Charles Hennen* for a term of eleven and three-quarter years (less ten days) from the 25th of December, 1866, at £70 per annum. This tenancy commenced in 1859 at the same rental. Mr. *W. R. Warner*, Secretary of the *Sun Permanent Benefit Building Society*, also occupies this floor for a term ending Michaelmas, 1870, at £20 per annum; he has been in occupation since Michaelmas, 1860, at the same rental. The *District Telegraph Company* have the use of the roof, having paid rent till October, 1868. The premises, 1, *Farringdon Road*, are underlet as follows:—A portion of the ground-floor to Mr. *George Butcher* for a term of twenty and three-quarter years, wanting ten days, from Midsummer, 1865, at £100 per annum. A further portion of the ground floor to Mr. *S. J. Butcher*, for a term of twenty and three-quarter years at £150 per annum, wanting ten days. The upper part to the said *George Butcher* for a term of twenty years from Lady Day, 1860, at £110 per annum.	£ For leases . . . 6165 Fixtures at a valuation, say . . 500 Compensation . . 3574 Personal expenses, and removal of planned furniture . . . . 150 Surveyor's, law, and other charges 200 10,589

The under-tenants of the houses had also sent in separate claims for compensation, amounting in all to £25,000.

In answer to the Plaintiff's claim, the Corporation, on the 10th of July, 1868, made a formal offer to Plaintiff of 5*s.* "as and for a recompense and satisfaction for the value of your estate and interest in the lands and hereditaments in the said statement particularly described, and as and for the compensation for any improvements, fixtures, injury, or damage sustained by you.

The following warrant, or precept, was issued by the Lord Mayor:—

"To the Sheriffs of the City of *London*.—By virtue and in pursuance of the *Holborn Valley Improvement Act*, 1864, and the Acts incorporated therewith or extended thereto, you are hereby commanded to take the necessary steps for having nominated forty-eight substantial and indifferent persons qualified to serve on special juries in the city of *London*, and to have such jurors, when so nominated, reduced in number to twenty-four, in like manner as special jurors are now reduced in the superior Courts of *Westminster*, and to summon, return, and impannel the said twenty-four jurors to come and appear before the Court of Mayor and Aldermen of the city of *London*, to be holden in the Outer Chamber of the *Guildhall* of the said City, according to the custom of the said City, on Saturday the 25th day of July, 1868, by ten of the clock in the forenoon of the same day, when and where a special jury of twelve men are to be balloted for, called, and drawn out of such persons so summoned, returned, and impanneled as aforesaid, in such manner as special juries for the trial of issues joined in Her Majesty's Courts at *Westminster* are directed to be drawn, upon their oaths to inquire of, assess, and ascertain, and give a verdict for, the sum or sums of money to be paid for the purchase of, or a satisfaction or recompense for the value of, the leasehold estate and interest to which *Henry Abrahams, Sydney James Butcher, George Butcher, David Read* and *Charles Hennen, John Hatfield, Samuel Owen, Annie Fryer, Martha Jane Bowen, Richard Maynard Coombe*, and the *Sun Permanent Benefit Building Society*, claim to be entitled of and in the piece or parcel of ground, with the messuages, or tenements, warehouses, and appurtenances thereupon erected, situate and being No. 88, *Snow Hill*, and No. 1, *Farringdon Road*,

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both in the parish of *St. Sepulchre*, in the city of *London*, the said premises being premises mentioned and described in the plan and book of reference referred to in the said Act, and which the Mayor, and Aldermen, and Commons of the said City, in Common Council assembled, are, by virtue of the said Acts and the Acts incorporated therewith or extended thereto, empowered to take and use for the purposes thereof, and in respect of which the said Mayor, Aldermen, and Commons, by their duly authorized agent, in writing, gave due notice on the 19th day of December, 1867, and the 25th and 31st days of January, 1868, to the said *Henry Abrahams* (and his under-tenants, naming them) of their intention to take the same for the purposes of the said Act, and also of the compensation to be made to the said *Henry Abrahams*, &c., in respect of any improvements, fixtures, injury, or damage whatsoever to be lost or sustained by them, the said *Henry Abrahams*, &c., as occupiers of the said premises, on account of the said Act, the particulars of which estate and interest, improvement, fixtures, injury, or damage, together with the amount of the sum of money which the said *Henry Abrahams*, &c., expected and were willing to receive in satisfaction or recompense for the value of such estate or interest, and also the amount of the sum which they expected and were willing to receive as compensation for such improvements, fixtures, injury, or damage respectively, are contained in the statements in writing dated the 16th day of January, the 21st, 22nd, 28th, and 29th days of February, the 4th, 14th, 17th, 18th, and 26th days of March, in the year of our Lord 1868, and delivered, in pursuance of the said Act, at the office of the Comptroller of the said City."

The Plaintiff had been served with notice of trial in the Mayor's Court for the 25th of July, 1868, in order that they (the jury) "may upon their oaths inquire of, assess," &c. (following the terms of the precept).

The Plaintiff, considering that he would be prejudiced and embarrassed by being joined with other claimants in one trial and assessment (many of these claims having been stated by the City Solicitor to be, in his opinion, of a fraudulent and fictitious character), had filed his bill to establish his right to have the purchase-money and compensation payable to him under the Act,

assessed and ascertained separately from the purchase-money and compensation payable to the other claimants. He now moved for an injunction to restrain any further proceedings under the precept and notice of trial, and also to restrain the Defendants from taking possession of the Plaintiff's premises until the purchase and compensation-money payable to him should have been separately inquired of, assessed, and ascertained, paid, or deposited, according to the provisions of the Acts of Parliament.

In his affidavit in opposition to the motion, Mr. *Nelson*, the City Solicitor, adverted to the fraudulent and fictitious character of the claims sent in, as many as ten different leases having been granted in respect not only of floors but even of rooms, all since the passing of the *Holborn Valley Improvement Act*. Mr. *Nelson* also stated that it was "formerly the invariable practice in the city of *London* (which in cases where property is taken otherwise than by agreement, acts under a special Act of its own, differing most materially from the *Lands Clauses Act*, 1845), to include all the interests in a house in one precept, and although no case has recently arisen until this one, to render such a course necessary, I humbly submit that the precept mentioned in the bill is perfectly lawful, and that the circumstances amply justify the use of such a power." (1).

(1) By sect. 5 of the *Holborn Valley Improvement Act*, 1864, all the provisions of the *London* (*City*) *Improvement Act*, 1847 (10 & 11 Vict. c. cclxxx.) except sect. 19, and in the *Lands Clauses Act*, 1845, except the last part of the Act with respect to the purchase and taking of lands otherwise than by agreement, and in the *Lands Clauses Amendment Act*, 1860, were incorporated into the Act; and for the purposes of the Act the term "this Act" throughout the *Improvement Act*, 1847, should be read and have effect as meaning the present Act, and, for the same purposes, "The *Improvement Act*, 1847," should have effect subject and according to the following provision (among others):—

"The jury to be summoned under sect. 21 of the *London* (*City*) *Improvement Act*, 1847, shall be a special jury, and shall be reduced to twenty-four in like manner as special juries are now reduced in the superior Courts of *Westminster*."

The following sections of the *London* (*City*) *Improvement Act*, 1847, were material:—

Sect. 20: "And be it enacted that on or before the expiration of one month next after notice in writing from the Mayor, Aldermen, and Commons, or their agent duly authorized, of the intention to take or use any land for the purposes of this Act, shall have been so given, left, or affixed, as hereinbefore is mentioned, every person interested in, or entitled to, or by this Act enabled to sell and convey any such lands, or to accept and receive satisfaction or recompense for the value of the same, or

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1868

ABRAHAMS v. MAYOR, ALDERMEN, AND COMMONS OF THE CITY OF LONDON.

Mr. *Druce*, Q.C., and Mr. *Yool*, in support of the motion :—

The precept in directing one trial before one jury for the purpose of assessing in one lump sum the whole amount of compensa-

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any estate, share or interest therein, or charge thereon, or having or claiming to be entitled to any compensation for any improvements, or for fixtures, or for any injury or damage sustained on account of the execution of this Act, shall deliver at the office of the Comptroller of the Chamber of the said City a statement in writing of the particulars of the estate, share, interest, or charge which he may claim to be entitled to or to be authorized to receive satisfaction or recompense for, and of any improvements, and of the fixtures, and of the injury or damage sustained by him, and of the amount of the sum of money which he may expect and be willing to receive in satisfaction or recompense for the value of such estate, share, interest, or charge, and also the amount of the sum which he may expect and be willing to receive as compensation for such improvements or fixtures, and for such injury or damage respectively."

Sect. 21: "And be it enacted that if any person interested in, or entitled to, or by this Act enabled to sell and convey any lands described in the schedule to this Act annexed, or any share, estate, or interest therein, or charge thereon as aforesaid, or any occupier thereof sustaining such loss, injury, or damage as aforesaid, for and on his part, or for or on the part of his *cestui que trust* or ward, or of any other person aforesaid, shall refuse to accept such purchase-money, satisfaction, or recompense, or other compensation as shall be offered by the Mayor, Aldermen, and Commons, or any person authorized by them on their behalf, or if any person interested in, or entitled to, or by this Act enabled to sell and convey any such lands as aforesaid, shall (upon such notice in writing as hereinbefore is mentioned having been so given, left, or affixed as aforesaid) for the space of one month next after such notice neglect or refuse to send in a statement of the particulars of his claim in respect of any lands, or shall neglect or refuse to treat or agree, or shall not agree, or, by reason of disability, cannot agree, with the Mayor, Aldermen, and Commons, or with any person authorized by them for the sale or conveyance of such lands, or any share, estate, or interest therein, or charge thereon, who shall not produce and evince a clear title to the premises he is in possession of, or to the interest he shall claim therein, to the satisfaction of the Mayor, Aldermen, and Commons, or of the person authorized by them, then, and in every or any such case, the Lord Mayor of the said City for the time being shall be, and he is hereby empowered thereupon, or at any time thereafter, to issue a warrant or precept under his hand or seal of office to the Sheriffs of the city of *London*, commanding such sheriffs to summon, return, and impannel a jury, and such sheriffs are hereby authorized and required accordingly to summon, return, and impannel forty-eight substantial and indifferent persons qualified to serve on juries, and the persons so to be summoned, returned, and impannelled as aforesaid, are hereby required to come and appear before the Court of Mayor and Aldermen of the city of *London*, to be holden in the Outer Chamber of the *Guildhall* of the said City according to the custom of the said City, at such time and place as in such warrant

tion payable for these separate claims, is not warranted by the Acts under which it has been issued. The Plaintiff will be greatly damnified by having his claims mixed up in one trial with those

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or precept shall be directed and appointed, and to attend the said Court from day to day until discharged, and out of such persons so to be summoned, returned, and impannelled, a jury of twelve men shall be drawn in such manner as juries for the trial of issues joined in Her Majesty's Court at *Westminster* are directed to be drawn, and in case a sufficient number of jurymen shall not appear at the time and place appointed as aforesaid, some person to be by the Court appointed shall return other substantial and indifferent men of the bystanders, or others who can be speedily procured to attend that service, being so qualified as aforesaid, to make up the said jury to the number of twelve, and all parties concerned shall and may have their lawful challenges against any of the said jurymen, but shall not be at liberty to challenge the array, and the said Court of Mayor and Aldermen are hereby authorized and empowered from time to time, as occasion shall require, by precept to summon and call before them every person whomsoever who shall be thought proper and necessary, to be examined as a witness on his oath touching or concerning the premises, and the said Court of Mayor and Aldermen, if they think fit, shall and may on the application of either party likewise authorize the said jury, or any three or more of them, either before or after they shall be sworn, to view the place and premises in question, in such manner as they shall direct, and the said Court of Mayor and Aldermen shall have power to adjourn such meeting from day to day, as occasion shall require, and to command such jury, witnesses, and parties to attend until all such affairs for which they were summoned shall be concluded, and the said jury upon their oaths (which oaths as well as the oaths of such persons as shall be called upon to give evidence, the said Court of Mayor and Aldermen are hereby empowered and required to administer) shall inquire of, assess, and ascertain, and give a verdict for the sum of money to be paid for the purchase of, or satisfaction or recompense for, either the entirety of such lands or for any share, estate, or interest therein, or charge thereon, as in such warrant or precept shall be directed, and the compensation which shall be made in respect of any improvements, or injury or damage whatsoever to be lost or sustained as aforesaid, to any person as in such warrant or precept shall be directed, and the said Court of Mayor and Aldermen shall give judgment for such purchase-money, satisfaction, recompense, or compensation so to be assessed, which said verdict and the said judgment thereupon shall be binding and conclusive to all intents and purposes upon all persons whomsoever; provided that in such inquiry the person claiming compensation shall always be deemed to be the Plaintiff, and entitled to the same rights and privileges as Plaintiffs in actions at law are entitled to, provided also that not less than fourteen days' notice in writing of the hour or time and place at which such jury are so required to be returned and meet be given to the principal officer, or left at the principal office of business of the corporation, or to the person interested, or claiming so to be, by leaving such notice at his usual or last place of abode

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of eleven different persons, each "fighting for his own hand," many of whom have sent in claims which have been branded as fraudulent and fictitious. The only result can be to prejudice the Plaintiff's case, and after he has submitted to the trial, and taken his chance of what the jury may find upon these claims, it will be too late to obtain any remedy. The Judge trying the case is bound strictly by the terms of the precept, and has no discretion to vary or extend it. Upon this precept one jury only can be summoned, there can be only one trial, and one verdict for one lump sum can only be given. Such a verdict when given cannot be quashed or vacated as it will be in accordance with the precept, and the only remedy open to the Plaintiff is in this Court by injunction to restrain the Defendants from proceeding to trial upon this invalid precept. [They cited *Maunsell* v. *Midland Railway Company* (1), *Taylor* v. *Clemson* (2) (as to the difficulty of setting aside an inquisition after the assessment by the jury); *London and North Western Railway Company* v. *Smith* (3).]

Sir *Roundell Palmer*, Q.C., and Mr. *A. E. Miller*, for the Defendants:—

The precept has been properly issued, and the Plaintiff cannot possibly be damnified by the form of it. His whole argument rests upon the assumption that the Corporation do not intend to have each case separately gone into. But the precept itself shews that they are prepared to take a verdict either in a lump sum or in separate sums. It by no means follows that all these different claims will be lumped together and tried by one jury. The parties

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or business, or with some tenant or occupier of some of the said lands, or by affixing the same upon the said premises."

Sect. 23: "In all cases in which a verdict shall be given for the value of any estate of freehold or any lands, or share therein, the jury shall, if required so to do by or on behalf of the Mayor, Aldermen, and Commons, inquire of, assess, and ascertain the value of the fee simple of the entirety of the said premises, and shall afterwards apportion and divide the value so ascertained between and among all the different shares, estates, interests, and charges which shall be claimed therein, and also between different parts of the said lands alleged to be held under different titles."

(1) 1 H. & M. 130, 149.

(2) 11 Cl. & F. 610.

(3) 1 Mac. & G. 216.

may or may not be entitled to have separate juries, but they can only have one panel out of which the several juries will be struck, while it will be in the discretion of the Judge trying the case to take the claims separately or together. Section 23 (*City Improvement Act*, 1847), expressly authorizes the jury "to apportion and divide the value so ascertained between and among all the different shares, estates, interests, and charges which shall be claimed therein, and also between different parts of the said lands alleged to be held under different titles." Moreover, there will be great additional cost and delay if there is to be a separate panel for each of these separate claims, and it is essential in estimating the amount of compensation that the mutual relation to each other of these several interests should be taken into account.

[The VICE-CHANCELLOR suggested that there should be one jury only to try all the claims, but that each case should be tried separately.

The Corporation were willing to consent that the cases should be taken separately, and separate verdicts given upon each claim, but the Plaintiff declined to accede to this proposal.]

Mr. *Druce*, in reply.

SIR G. M. GIFFARD, V.C.:—

I certainly am not about to proceed in this case upon any supposition that the *London and North Western Railway Company* v. *Smith* (1) is law, for it is quite clear that that case was dissented from by Lord *Truro* in *East India Dock Company* v. *Gattke* (2), and in the *South Staffordshire Railway Company* v. *Hall* (3) by the late Lord Justice *Turner*, and elsewhere by Lord *Cranworth*, in the plainest possible language. I apprehend the state of the law to be simply this, that so long as bodies invested with powers such as this Corporation is invested with, are proceeding within the limits and the powers conferred upon them by their Act of Parliament, and are proceeding *bonâ fide*, this Court cannot interfere. On the other hand, if in any respect they are exceeding those powers, or are not proceeding in accordance with

(1) 1 Mac. & G. 216. (2) 3 Mac. & G. 155.
(3) 3 Mac. & G. 353.

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them, this Court, as a matter of course, will grant an injunction. That being so, the only question is, whether the Corporation is or is not intending to proceed, or has or has not proceeded, in accordance with the powers conferred upon it by the Act, or whether it is exceeding, or has exceeded, those powers. The facts of the case are exceedingly simple. The Corporation has served separate notices upon persons who either have, or allege that they have, entirely separate interests. These persons have sent in separate claims; and those separate claims having been sent in there has been a warrant, or *præcipe*, directed to the sheriff; and the real question is whether that warrant, or *præcipe*, is or is not in accordance with the powers conferred by the Act. I can have no doubt whatever but that any Judge who has to act under this precept must act in direct and strict accordance with it, and that the verdict and judgment, and all the proceedings, must follow its terms, and that he can have no discretion whatever to depart from it in any respect. [His Honour, after reading the precept set out in the statement, continued:—] I can have no doubt whatever but that under that precept there can be but one trial and but one verdict. It is possible that that verdict may be a verdict for one sum, or for a number of different sums, but I am quite satisfied that no person acting in accordance with that precept can do more than have one trial, one jury, and one verdict, and that, in point of fact, on that trial every one of these claims must be tried.

That being so, is it or is it not within the terms of this Act of Parliament? There are not more than two clauses which have much bearing on the subject, sects. 20 and 21, sect. 23 referring to the valuation of freehold interests. [His Honour referred to these sections, observing that the words in sect. 21, "for either the entirety of such lands," must apply to a case where the entirety is claimed, and "for any share, estate, or interest therein, or charge thereon," must be where a share or interest only is claimed.]

I confess I can come to but one conclusion on that clause, and that is this, that the claim for compensation is, in point of fact, the declaration, so to speak, on which the whole proceedings turn, and that it is not in the power of the Mayor and Aldermen to tack on to any person who properly makes a separate claim any other

persons as Plaintiffs in the proceedings. It is quite obvious that in some cases it would be most unfair to do so, I do not say whether it would be unfair or not in this case, but it would be in a great variety of cases, and I think it is the right of the person who makes a separate claim, and properly makes a separate claim, to have a separate jury, a separate assessment of whatever is due to him, a separate verdict, and a separate payment.

I am also of opinion that upon this *præcipe* the Judge cannot take that course, and, that being so, it is the duty of this Court to interfere by injunction and restrain the Corporation from taking any proceedings on the footing of the *præcipe*. Whether it may be possible for the Corporation so to frame a *præcipe* as to have one array, and a number of separate juries and trials, it is not for me to say. I can only add this, that if this were a *præcipe* so framed, as far as I am concerned I should not interfere with it.

Solicitors: Messrs. *J. & M. Pontifex*; Mr. *T. J. Nelson*.

BELL *v.* BIRD.

Creditor's Deed—Administration of Trusts—Jurisdiction—Bankruptcy Act, 1861, *ss.* 192–200.

The administration of the trusts of a creditors' deed, which has been assented to and registered, so as to render it valid and binding under the provisions of the *Bankruptcy Act*, 1861, s. 192, belongs exclusively to the Court of Bankruptcy.

12 Ch. 364, 7 378.
5 Ch 221, 2, 5,
12 Eq. 69
2 Ch D. 551.

DEMURRER.

The bill, which was filed by Messrs. *Bell & Shirley*, partners and creditors of the Defendant *Ingersent*, on behalf of themselves and all other the persons entitled as creditors of *Ingersent* to the benefit of an indenture of the 2nd of April, 1867, except the Defendants *Bird* and *Graves*, contained the following statements:—

On the 2nd of April, 1867, the Defendant *Ingersent* entered into an arrangement with his creditors, and executed a trust deed of that date to *Bird* and *Graves* as trustees of the second part, and his creditors of the third part, whereby he assured to the trustees

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and their heirs all his real and personal estate upon the usual trusts for conversion and application of the proceeds in paying the creditors by instalments. The deed, which contained a declaration that it was intended to be a trust deed for the benefit of creditors within the provisions of the *Bankruptcy Act*, 1861, was duly executed by the debtor and the trustees, and was duly, in writing, assented to or approved of, and registered in manner required by sect. 192 of the *Bankruptcy Act*, 1861, and within the time thereby specified, and all things happened to render it binding under that section upon all the creditors, as if they had been parties to and had duly executed it. Default was made in payment of the first instalment, whereupon the trustees, under the trusts of the deed, proceeded to convert the real and personal estate, and also received large sums in respect of rents and of debts due to the debtor. The trustees had not applied the moneys received by them in payment of any dividend to the creditors, and had not come to any account with them, and in other respects were acting in contravention of the trusts of the deed, and there was danger of the moneys subject to such trusts being misapplied and lost unless the same were properly secured. The bill stated that the Plaintiffs were creditors to the amount of £174 16*s.* 11*d.*, and prayed that the trusts of the deed might be carried into execution under the decree of the Court; an account of the moneys received under the trusts of the deed by the trustees, and of the application thereof; that the trustees might personally answer the balance appearing due upon such accounts; and realization and application under the direction of the Court of the real and personal estate, subject to the trusts of the deed. The bill also prayed, if necessary, the appointment of a receiver, and an injunction to restrain the Defendants from getting in or otherwise intermeddling with the estate.

To this bill the Defendants demurred for want of jurisdiction.

A plea had also been put in to so much of the bill as prayed for the appointment of a receiver.

The demurrer was alone argued.

Mr. *Ince*, in support of the demurrer:—

This is the case of a deed having its binding effect solely under

sect. 192 of the *Bankruptcy Act*, 1861. Its validity depends on the Act alone, and the question of jurisdiction turns therefore on the statute. The requirements of the statute in reference to these deeds all point to the Court of Bankruptcy only. The terms of sect. 197 are express, and put the debtor, the trustees, and creditors in the position of a bankrupt, his assignees, and creditors. In fact the jurisdiction over trust deeds for the benefit of creditors, executed and registered under sect. 192, is confined exclusively to the Court which would have had jurisdiction if the debtor were a bankrupt on his own petition: *Ex parte Cox, In re Eaton* (1). Thus the deed operates as a private bankruptcy, and is analogous to a voluntary winding-up under supervision. Although in name a trust deed, there is nothing in the ordinary nature of trusts applicable to it. The so-called trustees are assignees in bankruptcy. This being so, the Court of Chancery will not entertain jurisdiction: *Wearing* v. *Ellis* (2); *Dyson* v. *Hornby* (3). If the jurisdiction were entertained, great inconvenience would arise from the conflicting powers of the Court of Chancery and the Court of Bankruptcy. [Upon this point he referred to the *Bankruptcy Act*, 1861, s. 136, and *Ex parte Pilkington* (4). He also cited *Griffiths* and *Holmes* on Bankruptcy (5); *Riches* v. *Owen* (6).]

Mr. *R. Horton Smith*, for the Plaintiffs:—

The question is, not whether there is jurisdiction in the Court of Bankruptcy to deal with a deed of this description, but whether the original jurisdiction of this Court over all deeds of trust is gone. There is nothing in the *Bankruptcy Act*, 1861, to oust the jurisdiction of this Court in the simple fact that a new jurisdiction is thereby given to the Court of Bankruptcy. A deed of this kind, when the conditions pointed out by sect. 192 have been performed, has a certain additional effect given to it, but it is not merely statutory. If the conditions imposed by the *Bankruptcy Act* have not been fulfilled, the deed is not an actual nullity, but neither more nor less than an ordinary trust deed which will be administered in this

(1) 31 L. J. (Bkcy.) 49.
(2) 6 D. M. & G. 596.
(3) 7 Ibid. 1.
(4) Law Rep. 3 Ch. 404.
(5) Pages 1034, 1037.
(6) Law Rep. 3 Ch. 820.

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Court. If, then, there is jurisdiction in this Court to deal with these deeds under any circumstances, what is there to take away that jurisdiction when the formalities necessary to bring it under the *Bankruptcy Act* have been complied with? There is, in fact, concurrent jurisdiction in the two Courts, and the creditor is thus enabled to obtain those equitable remedies by the appointment of a receiver, an account, and the like, which the Court of Bankruptcy cannot give him.

[He referred to *Ex parte Ruck* (1); *Pritchard* v. *Timothy* (2); *Ex parte Morgan* (3); *Ex parte Gibbons* (4); *Forshaw* v. *Mottram*, before Vice-Chancellor *Stuart*, 13th June 1867; *In re Price's Trust Deed* (5).]

Mr. *Ince*, in reply:—

A deed fulfilling all the requisites of the *Bankruptcy Act*, 1861, s. 192, is good and valid against every creditor. Such a deed apart from sect. 192 is unknown to the law. How but for that section can a deed executed by *A.* bind *B.* and *C.* who refuse to have anything to do with it? Admitting that there might be jurisdiction in this Court where, from some defect, the deed was not properly within sect. 192, that does not shew that when the requisites of that section have been all complied with this Court has concurrent jurisdiction. As well might this Court be called upon to direct the creditors' assignees as to how they should dispose of the bankrupt's estate, as to administer the trusts of a deed of arrangement valid and binding under sect. 192 of the *Bankruptcy Act*.

Judgment was reserved until the appeal in *Riches* v. *Owen* (6) was disposed of.

July 27. SIR G. M. GIFFARD, V.C.:—

In this case a demurrer for want of equity was filed by two of the Defendants, named *Bird* and *Graves*, to so much of the Plaintiffs' bill as seeks an administration of the trusts of a certain trust

(1) 32 L. J. (Bkcy.) 9.
(2) 14 L. T. (N. S.) 443.
(3) 1 D. J. & S. 288.
(4) 34 L. J. (Bkcy.) 39.
(5) Law Rep. 6 Eq. 460.
(6) Ibid. 3 Ch. 820.

deed of the 2nd of April, 1867. The demurrer was accompanied by a plea, the plea going to that part of the bill which sought a receiver. The bill was filed by two persons who are partners, on behalf of themselves and all other the persons entitled as creditors to the benefit of the deed, except the two demurring Defendants, those two Defendants being creditors and the trustees of the deed.

The case was argued, and very properly argued, on its merits; it being admitted that the questions raised were, whether, on the one hand, the Court of Chancery has concurrent jurisdiction to administer the trusts of such a deed as between the creditors, the debtor, and the trustees; or whether, on the other, the administration of those trusts within the limits of the deed does not appertain exclusively to the Court of Bankruptcy?

It is stated in the 6th paragraph of the bill, that the trust deed was duly assented to and registered as required by sect. 192 of the *Bankruptcy Act*, 1861, and that all things happened to render it binding under that Act. When the demurrer was argued the case of *Riches* v. *Owen* (1) was under appeal before the Lords Justices, and I reserved my judgment until after that case had been disposed of by them. Their judgment amounted simply to an affirmance of what had been done by this Court.

In *Riches* v. *Owen* the bill was filed by the trustees of the deed against the debtor. The deed was special in form, containing peculiar covenants on the part of the debtor, and I appointed a receiver; such a course, under the circumstances, being, in my opinion, necessary, with a view to preserve the property and insure its being brought within the operation of the deed. I put the Plaintiffs under an undertaking to abide by any directions the Court of Bankruptcy might give as to the property when received and secured, and I did this in order that it might not be supposed that it was my opinion that this was the proper Court to deal with the proofs of creditors, or with the administration and distribution of the property when secured, and capable of being dealt with by the trustees. In another, but uncontested case (*In re Price's Trust Deed* (2)), I, at the instance of the creditors, appointed a new trustee of a creditors' deed pursuant to the provisions of the *Trustee Act*, there either being no trustee, or no trustee capable of

(1) Law Rep. 3 Ch. 820. (2) Law Rep. 6 Eq. 460.

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acting, and no other means of appointing them. I observed at the time that the new trustee would be as much subject to the jurisdiction of the Court of Bankruptcy as if he had been originally constituted a trustee under and by the deed itself. The effect of the order was simply to perfect the deed. If I overrule this demurrer, I must necessarily hold that it is the duty of this Court in all cases such as this, and whenever required so to do in a creditors' suit of this description, to deal with the proofs of creditors, the accounts of the trustees, the making and distribution of dividends, and the return of the surplus property, if any, to the debtor. Supposing there had been a bankruptcy instead of this deed, the Court of Bankruptcy would have had exclusive jurisdiction over all these matters. This is well-established law; the cases on the subject are well known, and I need not quote them. What, then, was the intention of the Legislature as expressed in the Bankruptcy Acts? By the 6th section of the Act of 1849, the Court of Bankruptcy is continued as a Court of Law and Equity. The sections of the *Bankruptcy Act*, 1861, which have to do with deeds for the benefit of creditors, extend from the 192nd to the 200th. A certain majority of creditors are empowered to bind the minority; the deed is to be registered in the Court of Bankruptcy; the Court of Bankruptcy has exclusive jurisdiction as to extending the time of registration, and by sect. 197, it is enacted, that the debtor, and creditors, and trustees shall, in all matters relating to the estate and effects of the debtor, be subject to the jurisdiction of the Court of Bankruptcy, and not only so, but shall respectively have the benefit of and be liable to all the provisions of this Act, in the same manner as if the debtor had been adjudged a bankrupt, and the trustees had been appointed creditors' assignees. If there had been a bankruptcy the property and trusts sought to be administered here would have been administered exclusively in bankruptcy, and could not have been administered here. The enactment is, that the debtor, and creditors, and trustees shall have the benefit of, and be liable to, the provisions of the Act in the same manner as if the debtor had been adjudged a bankrupt; and this being so, I am of opinion that the deed is a substitution for bankruptcy, that the administration of the assets under it is properly in bankruptcy,

and that from that administration the jurisdiction of this Court is excluded. I am satisfied that this was the intention of the Legislature. I need hardly add that there are abundant reasons why it is very expedient, where the administration of trusts and the distribution of property under deeds such as these is in question, that there should be one exclusive and not two concurrent jurisdictions.

Demurrer allowed, with costs.

Solicitors: Mr. *Robert Peckham;* Messrs. *H. C. Nisbet & Co.*

CRUSE *v.* PAINE.

Contract for Sale of Shares — Custom of Stock Exchange — Guarantee of Registration—Executor with deficient Estate, Extent of Indemnity to.

Plaintiff, on the 2nd of November, 1865, through his brokers, sold 100 shares to the Defendants, who were stock-jobbers. The sale-note expressed that the sale was by order of the Plaintiff; that it was "subject to the rules of the *London Stock Exchange;*" and "with registration guaranteed:" also that payment was to be on the 15th of November following. Shortly before this date the Defendants sent to the Plaintiff's brokers the name of *H.* as transferee, with the purchase-money; and the transfers were executed by the Plaintiff to *H.*, and handed to his brokers. The transfers not having been registered, the Defendants, in December, 1866, obtained a decree for specific performance by *H.* of the contract with them, and for indemnity. Meanwhile the company had been wound up, and the Plaintiff's name being still on the register, was settled on the list of contributories. He then filed this bill against the Defendants for specific performance, and indemnity:—

Held, that stock-jobbers are principals, and personally liable upon the contracts into which they enter:

Held further, that the above facts did not disclose a novation of, or substitution of another contract for, the original contract; and that the Plaintiff was entitled to a decree for specific performance and indemnity.

The Plaintiff having died, his executor, having been placed on the list of contributories, revived the suit. The estate was insufficient:—

Held, that the right to indemnity was not limited to the amount of dividend which the estate would be sufficient to pay; but that the executor was entitled to all the rights to which his testator, if living, would have been entitled.

MOTION for decree.

On the 2nd of November, 1865, the Plaintiff, *Albert Cruse*, through his brokers, Messrs. *Vertue & Whiting*, sold on the *Stock*

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Exchange to the Defendants, *Hammon* and *George Paine*, who were stock jobbers, 100 shares in the *Contract Corporation, Limited*. The following is a copy of the sale-note :—

"22, *Threadneedle Street*,
London, E.C., 2nd Nov. 1865.

Sold by order and for account and risk of *A. Cruse*, Esq.
(Subject to the rules of the *London Stock Exchange*.)

To *H. Paine & Co.*

100 *Contract Corporation* shares, at 7 dis. . £300 0 0
(With registration guaranteed.)

V. & W.

Entd. 15th Nov.

Stamps and Fees			
	300	0	0
Brokerage	1	5	0
	£298	15	0

Receipt
Vertue & Whiting.
Stamp.

Payment 15th Nov."

By the contract the sale and purchase were to be completed on the 15th of November; and on that date the *Paines* (who had in the meantime entered into a contract for the sale of the same number of shares for £387 10*s.* to Messrs. *Price & Pott*, as brokers for *Robert Hopwood Hutchinson*) sent to *Vertue & Whiting* a memorandum with the name of *Hutchinson* as the person into whose name, by the direction of the *Paines*, the shares were to be transferred. On or about the 15th of November, 1865, *Cruse* duly executed two transfers from himself to *Hutchinson*, which were delivered to *Price & Pott*. The transfers themselves were not produced, but it was alleged that one of them was of fifty numbered shares, and in consideration of £200 paid by *Hutchinson* to *Cruse*, and the other in the same terms as the former, *mutatis mutandis*. On or about the 16th the purchase-money of £298 15*s.* was paid to *Cruse* through *Vertue & Whiting*.

On the 20th of December, 1865, *Cruse's* solicitors wrote to the *Paines*, and, receiving no answer, on the 9th of January again wrote to say that unless they on or before Friday then next took and registered a transfer of the shares, legal proceedings must be resorted to.

The Messrs. *Paine*, thus threatened, brought the matter before the committee of the *Stock Exchange*, under rule 49 of their regulations, which is as follows:—"The *Stock Exchange* does not recognise in its dealings any other parties than its own members. Every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the regulations and usages of the house; and should a principal, without the consent of the committee, attempt to enforce by law a claim against a member of the *Stock Exchange*, the committee will decide as to the liability of the broker or agent of such principal for any cost or damages incurred in consequence of legal proceedings."

"Bargains must be fulfilled according to regulations of the *Stock Exchange*."

On the 5th of January, 1866, the committee, having heard the Defendants and also Messrs. *Vertue & Whiting*, or their representatives, resolved as follows: "That the committee having taken into consideration, on the application of Messrs. *H. Paine & Co.*, the dispute between them and Messrs. *Vertue & Whiting* relative to the non-registration of 100 shares in the *Contract Corporation Company*, sold with guarantee for registration, are of opinion that Messrs. *Paine & Co.* are liable for the registration of the shares." This resolution was confirmed on the 15th of January, 1866.

On the 18th of January, 1866, the *Paines'* solicitors wrote to *Cruse's* solicitors to say they had threatened proceedings against *Hutchinson*, and on the 25th of January, 1866, a bill was filed by the *Paines* against *Hutchinson*, praying for specific performance of the contract, and indemnity.

On the 23rd of April, 1866, the *Contract Corporation, Limited*, was ordered to be wound up.

On the 5th of December, 1866, the cause of *Paine* v. *Hutchinson* was heard before Vice-Chancellor *Stuart*, who made a decree for specific performance, and ordered that the *Paines*, and all proper parties, should execute a proper deed of transfer of the 100 shares

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to *Hutchinson*, and that *Hutchinson* should procure the shares to be duly registered in his name, and pay the costs of the suit (1).

The name of *Cruse*, nevertheless, was not removed from the register, and was settled on the list of contributories. There was now due from him £500 in respect of a third call of £5 on the 100 shares, and a sum of £3000 in respect of a liquidator's call of £30 a share, made by order of the Court on the 7th of August, 1867, making £3500 together; and by the same order *Cruse* was made liable to pay the £3000 on or before the 1st of October, 1867.

In reply to applications made in August, 1867, *Paines'* solicitors in September wrote to say that the *Paines* had taken every step to enforce the registration of the transfer; and but for the pendency of an appeal against the Vice-Chancellor's decree, they believed that before this the object would have been accomplished.

This bill was filed on the 26th of October, 1867, stating that the meaning of the words, "with registration guaranteed," on the sold-note was, that the registration of the transfer of the shares on the sale was guaranteed by the purchaser. The Plaintiff charged that the Defendants ought to pay the amount of the calls due, and to indemnify the Plaintiff in respect thereof, and in respect of further sums which remained to be called up, and prayed that the contract of the 2nd of November, 1865, for the purchase by the Defendants from the Plaintiff of the 100 shares, might be specifically performed; and that the Defendants might be ordered to procure the registration of the transfer by the Plaintiff of the shares; to pay the amount for which the Plaintiff was liable for the calls, and to indemnify him in respect thereof, and of all other liability on the shares.

On the 3rd of January, 1868, the Defendants filed their answer, denying the Plaintiff's right to relief.

On the 13th of January the Plaintiff, *Albert Cruse*, died; and on the 10th of March the present suit was revived by *Julius Simon*, his executor and legal personal representative. *Cruse's* estate was sworn under £100.

On the 17th of March the decree of Vice-Chancellor *Stuart*, in *Paine* v. *Hutchinson* was affirmed by the Lords Justices (2).

(1) Law Rep. 3 Eq. 257. (2) Law Rep. 3 Ch. 388.

On the 20th of March *Simon*, the Plaintiff in the revived suit, was fixed on the list of contributories for the 100 shares.

The Defendant, *George Paine*, in an affidavit filed on the 12th of June, deposed as follows:—

"A guarantee of registration according to the rules and custom of the *Stock Exchange* had the effect only of entitling the said *Albert Cruse* to the interference and decision of the committee of the *Stock Exchange* (of which I and my co-partner are members), in the event of our improperly evading or neglecting doing everything in our power to enforce and obtain the due registration of such transfer." He further said that at the date of the institution of the suit of *Cruse* v. *Paine* it was out of the power of *Cruse* to perform the contract. *Cruse* could not recover at law any substantial damages by reason of breach of the guarantee for registration, because neither he nor his estate had been, or could be damnified substantially by reason of *Hutchinson's* failure to register. Since the decision of the Lords Justices Defendants' solicitors had renewed the application to the official liquidator, and they had reason to believe that he was prepared to take the necessary steps, so soon as *Hutchinson* should have been compelled to execute the transfer of the 100 shares pursuant to the decree, to carry out the same by placing *Hutchinson's* name on the register.

Mr. *Druce*, Q.C., and Mr. *Marten*, for the Plaintiff:—

So long as the decree in *Paine* v. *Hutchinson* remains unexecuted our right to relief is clear.

The answer does not set up a case of any novation of the contract. Nor does *Hawkins* v. *Maltby* (1) govern this case.

The VICE-CHANCELLOR:—It may lead to this, that the Plaintiff might have elected to go against the transferee.

Mr. *Druce*:—In *Hawkins* v. *Maltby* there was no intermediate dealing with the shares; no sub-purchase. Here, as we say, there was first a sale to the *Paines*, and then a sub-sale to *Hutchinson*.

It may be said that the sub-vendee has protected the liability of

(1) Law Rep. 4 Eq. 572; 3 Ch. 188.

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the vendee by his agreement to take the shares subject to the conditions on which the vendor held them; and that it is too late now for the vendor, who has had the benefit of the contract, to say that the vendee is liable. But that can only be where the sub-vendee has executed the transfer; until that is done, the rule must be the same as at law, and the vendor can proceed only against his purchaser: *Shaw* v. *Fisher* (1).

Then it is said that the Plaintiff sold subject to the rules of the *Stock Exchange*. But custom cannot do more than regulate a contract; it cannot make one. The custom does not affect the question of whether or not a contract has been executed. No doubt there may be a contract (though not a custom) that a vendor shall accept the name which the vendee may give. But even a contract of that kind would not effect a novation, it would not destroy the contract itself. Here the sub-vendee has not even executed the transfer. We cannot compel *Hutchinson* to execute.

The acts of the *Paines* show that there is a separate and subsisting contract between themselves and *Hutchinson*. Their conduct is inconsistent with the theory of a novation.

The *Paines* were jobbers, not brokers. A jobber is a dealer who buys on his own account, as distinguished from a broker. The rule of the *Stock Exchange*, so far from exempting brokers from liability, says that they shall be looked upon as owners as much as jobbers are. The *Paines* consequently bought as principals, as the decision of the *Stock Exchange* committee shews.

The statement of the transaction by Lord Justice *Wood* (2) is conclusive.

[*Coles* v. *Bristowe* (3), *Sheppard* v. *Murphy* (4), and *Grissell* v. *Bristowe* (5), were also referred to.]

Mr. *Kay*, Q.C., and Mr. *Higgins*, for the Defendants:—

Our defence is, that the Plaintiff was bound by the rules of the *Stock Exchange* to accept as transferee of the shares any *bonâ fide* purchaser whom we might name. The rule of the *Exchange* was imported into the contract. We further say that we ought not,

(1) 5 D. M. & G. 596.
(2) Law Rep. 3 Ch. 390.
(3) Ibid. 6 Eq. 149.
(4) 1 Ir. Rep. Eq. 490; reversed on Appeal, 16 W. R. 948.
(5) Law Rep. 3 C. P. 112.

and that *Hutchinson* ought, to pay these calls, and indemnify the Plaintiff.

The Plaintiff does not allege one farthing of damage.

It is shewn that he might have had relief against *Hutchinson*. Can he also have relief against us? It is the holder of the shares who is responsible.

The VICE-CHANCELLOR:—I do not find that the answer states *Hutchinson* to be the holder of the shares.

Mr. *Kay*:—The answer avers that *Hutchinson* was the purchaser, and that the persons who paid the purchase-money were his brokers.

The VICE-CHANCELLOR:—There is no allegation that the *Paines* were ever released from the obligation of getting some one's name registered as transferee.

Mr. *Kay*:—In *Close* v. *Wilberforce* (1) the assignee of a lease agreed to sell, and it was stipulated that the purchaser should not be entitled to an assignment, and he having entered and retained possession, was held bound to indemnify the original lessee, as if he had executed a covenant. So here, if *Hutchinson* purchased, he is under an implied covenant to indemnify: *Evans* v. *Wood* (2); *Hawkins* v. *Maltby* (3).

In *Grissell* v. *Bristowe* (4) Sir *W. Byles*, J., differed. *Shepherd* v. *Gillespie* (5), and *Sheppard* v. *Murphy* (6), shew that the remedy is against *Hutchinson*. [*Hodgkinson* v. *Kelly* was also cited (7)].

If the Plaintiff cannot have specific performance against these Defendants, his right of indemnity is gone also.

We have done everything in our power to get *Hutchinson's* name registered.

If the Court should be against us on the other points, we say that the Plaintiff's right of indemnity at least does not extend beyond the amount which his estate may actually suffer.

The VICE-CHANCELLOR said his only difficulty was as to the

(1) 1 Beav. 112.
(2) Law Rep. 5 Eq. 9.
(3) Ibid. 4 Eq. 572; 3 Ch. 188.
(4) Ibid. 3 C. P. 135.
(5) Law Rep. 5 Eq. 293; 3 Ch. 764.
(6) 1 Ir. Rep. Eq. 490. Reversed on Appeal, 16 W. R. 948.
(7) Law Rep. 6 Eq. 496.

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form of the decree. He should like to hear a reply on the question whether the decree ought not to be in this form:— It appearing that the Plaintiff *Cruse* is dead, and it not being alleged that he ever paid anything, declare that the Defendants are liable to indemnify *Cruse* and his executors against all liability and costs which *Cruse* or his executors have incurred since the 2nd of November, 1865, or which his executors may hereafter incur in respect of the shares; and against all liability, loss, costs, charges, and expenses, &c. (as above), by reason of *Cruse* having been settled on the list of contributories; and let there be an inquiry to ascertain the amount of the loss already incurred; His Honour's intention being that the Defendants should not be called upon to pay more than the dividend which *Cruse's* estate could pay in respect of that claim.

Mr. *Druce*, in reply:—

Lord Justice *Wood* says expressly (1): "The shares stood in *Cruse's* name, but from the moment they were bought by the *Paines* they became the property in equity of the *Paines*, and *Cruse* was a mere trustee for them." Now, in *In re National Financial Company* (2), where *M.* was a holder of 100 shares in the *Tyne Company*, as trustee for the *National Financial Company*, both the companies being wound up, and calls having been made upon *M.*, which he failed to pay, *M.* was held entitled to rank as creditor of the *National Financial Company* for the full amount of calls which had been so made on him, with interest, and also for future calls. That decision, therefore, governs the present.

Why should the executor be kept in perpetual danger of being harassed? Is *Cruse's* estate to be administered in this Court merely for the amusement of the *Paines*, who can reap no benefit from the process?

SIR G. M. GIFFARD, V.C.:—

Upon this last point I shall reserve my judgment. I will dispose of the rest of the case at once; because I have not the slightest doubt upon it, nor should I have had the slightest doubt if Mr.

(1) Law Rep. 3 Ch. 390. (2) Law Rep. 3 Ch. 791.

Cruse had been here as Plaintiff, instead of his executor with apparently an insufficient estate.

Now, with regard to the case itself: first of all, we have the contract alleged, which is a very plain contract; and if nothing had been done beyond entering into that contract, it would be clear. Jobbers are simply principals, and act as principals, and jobbers are personally liable upon the contracts into which they enter. There is no question whatever about that. I consider that to be perfectly clear. The contract, which is dated the 2nd of November, 1865, is as follows:—[His Honour read the sold-note set out above.] If the matter had stood there, there could be no doubt whatever in this Court what the result of that would be. The result would be, that from that moment, *Paine & Co.* would be considered in this Court as the owners of the shares, and would be bound from that moment to indemnify the vendor against all calls and expenses, and everything else. The bill goes on to say that the sale took place, and continues: "The said Messrs. *Vertue & Whiting*, in due course of business, according to the custom of the *Stock Exchange*, on or after the 2nd of November, 1865, and before the 15th of that month, received from the said Messrs. *Hammon Paine & Co.* a note in writing of the name of *Robert Hopwood Hutchinson* as the person into whose name, by the direction of the said *Hammon Paine & Co.*, the said shares were to be transferred; and on or about the 15th of November, 1865, the said *Albert Cruse* duly executed a transfer, in the usual and proper form, of the said 100 shares to the said *Robert Hopwood Hutchinson* accordingly." There that statement rests; and, as far as I can see, that statement has not been affected in any respect. We will examine in one moment what is said by the Defendants in their answer; but surely it cannot be said that, if there is a contract between the Plaintiff and the Defendants which makes them distinctly liable to the Plaintiff in respect of these shares, and puts them in the same position as though they were shareholders instead of him, the mere fact of his having executed at their instance a transfer, can alter the liabilities of the one or the other? I apprehend, in order to alter those liabilities you must aver and you must make out this, that there has been another, a new and different, contract entered into, and that the nature of that other

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new and different contract is, that it is substituted, and intended to be substituted, for the first contract; that, in point of fact, there has been what is termed a "*novatio.*" If such a state of things as that could be made out, then the intermediate person who had purchased would be entirely free, and there would be clearly a subsisting contract between the vendor who had executed the instrument and the new purchaser.

Let us see what the answer itself says upon that subject, and upon the subject of the rules of the *Stock Exchange.* I do not at all recede from saying that I think the rules of the *Stock Exchange* are part and parcel of the contract.

The answer says this, first of all, in paragraph 2: "We admit, for the purposes of this suit, but not further or otherwise, that the said sale, as appears by the said sold-note, was made "with registration guaranteed"; meaning thereby that the registration of the transfer of the said shares upon the said sale was guaranteed by us, the said purchasers, but not necessarily, or even probably, in our own names. Such guarantee, however, is intended to have effect merely as between members of the said *Exchange.*" I say at once I cannot import—and there is no rule of the *Stock Exchange* suggesting anything of the sort—into that contract that the guarantee is intended to have effect only as between members of the *Stock Exchange.* It is, on the face of the contract itself, a contract with Mr. *Cruse,* and there is no rule of the *Stock Exchange* which says it is to be subject to any such restriction.

Then we come to paragraph 3:—"We admit for the purposes of this suit, but no further or otherwise, that we did, in due course of business, and according to the custom of the *Stock Exchange,* and after the 2nd of November, 1865, and on or before the 15th of that month, send to the said Messrs. *Vertue & Whiting* a note in writing with the name of *Robert Hopwood Hutchinson* as the person into whose name, by the direction of our said firm, the said shares were to be transferred; the said *Robert Hopwood Hutchinson* being the actual or ultimate purchaser thereof by our intervention as such dealers, according to the ordinary course of business on the said *Exchange;* and that the said *Albert Cruse,* on or about the 15th of November, 1865, did duly execute a transfer in the usual form of the said 100 shares to the said *Robert Hopwood*

Hutchinson accordingly, as, we submit, the said *Albert Cruse* was bound to do under his said contract, according to the rules of the said *Exchange*."

What does that amount to? It amounts to this: if you contract with a man according to the rules of the *Stock Exchange*, the man who contracts with you is simply bound to execute at your request a transfer to the name that may be submitted to him. It amounts to nothing more.

Now we will go further:—Paragraph 4. "We say that Messrs. *Price & Pott*, who were the brokers of the said *Robert Hopwood Hutchinson*, paid directly to Messrs. *Vertue & Whiting*, as the Plaintiff's said brokers, the purchase-money receivable by them in respect of the said shares, and we believe such payment was made on or about the 16th day of November, 1865, which would be according to the regular course of business; and, save as aforesaid, or otherwise than in manner hereinbefore appearing, we deny that we did on or about the 16th of November, 1865, or at any time, in the usual course of business, on the said *Stock Exchange*, or in any manner, pay to the Plaintiff through the said Messrs. *Vertue & Whiting*, or any other person or persons, the purchase-money of the said shares, according to the said sold-note of the 2nd of November, 1865, or otherwise."

Now, pausing there; is that an adoption of or entering into a new contract? That Mr. *Cruse* contracted with the Defendants, and, there being a subsisting contract between him and these Defendants, under which they guaranteed the registration, that he should execute a transfer to some other person, that that other person, although unknown to the parties, is the person who pays to the broker the purchase-money; all that is quite consistent with the real facts, namely, that there was, first, a contract between the Plaintiff and the Defendants, and then a contract between the Defendants and Mr. *Hutchinson*, and it does not in the slightest degree alter that state of things.

Then the 5th paragraph is:—"We deny that we have hitherto refused or neglected, or that we do now refuse, to cause the said shares to be registered; and we make out the contrary, as herein appears. We say that ever since the Plaintiff executed the said transfer to the said *Robert Hopwood Hutchinson*, and the

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same came to his possession, as it did, in fact, with the knowledge and sanction of the Plaintiff, we have been unable to succeed in our endeavours to compel him to execute the same, although we have gone to considerable expense for this purpose, in instituting and prosecuting the suit of *Paine* v. *Hutchinson* hereinafter mentioned. The sale to us of the said shares as hereinbefore mentioned, and as appears upon the face of the said sold-note, was subject to the rules of the *London Stock Exchange*, according to which rules the Plaintiff was bound, on or for the next settling day, namely, the 16th of November, 1865, to accept as transferee of the said shares any *boná fide* purchaser from us, these Defendants, and was bound to execute a transfer to such new purchaser." So be it; that does not carry the matter at all further. "And a guarantee of registration did not, and does not, imply that the shares would be registered in the names of the persons giving such guarantee—that is, in the present case, of us these Defendants—but only that we would procure a purchaser who would register the transfer."

Now, what is the whole of the case? It really is the simplest and plainest I ever saw, for the rule of the *Stock Exchange* is this, so far as it applies to the contract that was entered into—that if they submitted another name, the vendor was to execute a transfer to some other person so named; but it did not in any sense release the Defendants from their obligation to get a complete registration, so that the vendor should by their act be actually released from all liability in respect of these shares. That is upon their own statement, which I have no doubt is consistent with the truth, consistent with the contract, and consistent with the rules of the *Stock Exchange;* and if it had so happened that Mr. *Hutchinson* had at their instance actually registered, there would have been an end to the whole transaction, and it would have been completely carried out as it ought to have been. But there is no attempt at an allegation of the one thing being received and accepted by the Plaintiff in discharge of the other. There is nothing like a novation alleged; nothing like a novation ever took place; and that being so, I am clearly of opinion that these Defendants are liable, to some extent, at all events, to indemnify this Plaintiff.

As I have said, if Mr. *Cruse* were alive I should not have the

least doubt as to the form of the decree I should make. But in consequence of his death there is some difficulty, and that is a point I should like to consider; but, beyond all question, the Defendants must pay the costs of this suit.

It was suggested on the form of the pleadings that the bill asked for specific performance, and for indemnity only as incident to specific performance; and that as, from the fact of the company having been wound up, and Mr. *Cruse's* name having been placed on the list of contributories, there could be no specific performance, therefore there could be no indemnity. But I see no reason why, because there cannot be specific performance and indemnity, the Plaintiff should not be entitled to indemnity alone.

July 30. SIR G. M. GIFFARD, V.C.:—

I have already given my reasons for being of opinion that the Defendants are liable under the contract of November, 1865. I added at the time I did so, that if Mr. *Cruse* had been alive I should have followed the form of the decrees in *Evans* v. *Wood* (1), and *Shepherd* v. *Gillespie* (2).

It so happened, however, that Mr. *Cruse* died before paying any call, though calls had been made; and that his executor, who revived the suit, swore his estate under a very small sum, I believe under £100. This being so, the question I reserved for consideration was, whether a decree should be made against the Defendants directing in terms actual payment of the calls which had been made on Mr. *Cruse*, and which might hereafter be made on his executor, or whether he should be ordered only to pay such sums as, regard being had to the amount of Mr. *Cruse's* assets, would be properly payable thereout.

I am not aware of any case in which a bill of this description has been filed, either by the assignees of a bankrupt, or the legal personal representatives of a deceased person. The question as between the Plaintiffs and the Defendants is wholly irrespective of the *Contract Corporation*, and at first sight it occurred to me that the Defendants were not bound to pay more than the corporation could actually recover from the executor.

(1) Law Rep. 5 Eq. 9. (2) Law Rep. 5 Eq. 293; 3 Ch. 764.

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On consideration, however, I am satisfied that this is not the true view of the relative positions of the Plaintiff and the Defendants. Mr. *Cruse* had an unquestionable right to compel the Defendants to pay all the calls in full. If he had been a surety or a trustee in the strict sense of the term, his executors would have had the same right. The effect of the contract of November, 1865, was, that from its date the Defendants were bound to assume Mr. *Cruse's* liabilities in respect of the shares. If the corporation had not stopped payment, the Defendants must either have registered themselves as shareholders, or have procured the registration of a nominee in such a way as to have been substituted for Mr. *Cruse*, and by standing in his place to have exonerated Mr. *Cruse* and his executors from liability; and I am of opinion that the executor is entitled to all the rights which Mr. *Cruse* could have enforced, whether the assets are or are not sufficient to pay the debts in full. For the contract cannot be varied because Mr. *Cruse* left a small amount of assets, nor can the Defendants justly complain of having to perform what they agreed to do. Moreover, as it is in the power of the executor to compel the payment of these debts in full, he may well say he considers it his duty, and insist on his right to do so.

The decree, therefore, must follow the decrees in *Evans* v. *Wood* (1) and *Shepherd* v. *Gillespie* (2).

Solicitors for the Plaintiff: Messrs. *Thomas & Hollams.*

Solicitors for the Defendants: Messrs. *Lewis, Munns, Nunn, & Longden.*

(1) Law Rep. 5 Eq. 9.

(2) Law Rep. 3 Ch. 764.

LYON *v.* HOME.

V.-C. G.

1868

April 21, 22, 23, 24, 27, 28, 29, 30; *May* 1, 22.

Undue Influence—Spiritualism.

A., a widow, aged seventy-five, within a few days after first seeing *B.*, who claimed to be a "spiritual medium," was induced, from her belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of *B.*, to adopt him as her son, and transfer £24,000 to him; to make her will in his favour; afterwards to give him a further sum of £6000; and also to settle upon him, subject to her life interest, the reversion of £30,000 (these gifts being made without consideration, and without power of revocation):—

Held, that the relation proved to have existed between them implied the exercise of dominion and influence by *B.* over *A.'s* mind; and, consequently, that as *B.* had failed to prove that these voluntary gifts were the pure, voluntary, well-understood acts of *A.'s* mind, they must be set aside.

8 Eq 562
18 Eq 54
12 LT 743
749

THIS was a suit for the purpose of setting aside certain transfers of stock to the amount of £30,000, and an assignment in reversion, subject to Plaintiff's life interest, of a mortgage security for £30,000, made by the Plaintiff, without any consideration, in favour of the Defendant, *Daniel Dunglass Home*, on the ground that these gifts were obtained by the Defendant by undue influence, and were fraudulent and void, and not binding upon the Plaintiff.

The Plaintiff, Mrs. *Jane Lyon*, who was a widow and childless, past seventy, and the natural daughter of a tradesman at *Newcastle*, was left, at the death of her husband in August, 1859, absolutely entitled to a very considerable fortune, a great portion of which had been transferred to her by him during his lifetime; she had also received a fortune of from £15,000 to £20,000 from her father, and her income at the date of the transactions in question was upwards of £5000 a year, of which she spent not more than £500. She had no relations of her own, and was not on intimate terms with those of her husband. She lived in *London* lodgings at a rent of about 30*s.* a week out of, and 40*s.* during, the season. She had no servant of her own, saw little or no society, and had no friends about her capable of giving her advice. She was very devoted to the memory of her dead husband, of a fanciful, visionary turn of mind, and was under the impression, from something said by her husband before his death,

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that she should not survive him more than seven years. In July, 1866, she called upon Mrs. *Sims*, a photographer in *Westbourne Grove*, to get a photograph taken of a portrait of her husband. In the course of conversation she mentioned to Mrs. *Sims* what her husband had said before his death, and her impression that she should soon meet him in the grave. Mrs. *Sims* replied that it was not necessary for her to die in order to meet her husband again; but that if she were to become a spiritualist he would come to her. Mrs. *Sims* lent the Plaintiff some books upon the subject, and spoke to her of "the Head Spiritualist, Mr. *Home*" (the Defendant), who had recently opened an *Athenæum* at 22, *Sloane Street*, suggesting that the Plaintiff should write to him for a prospectus and particulars. The Plaintiff made some inquiries in *Sloane Street*, but without success; and on the 28th of September she wrote to a Mrs. *Burns*, a librarian at *Camberwell*, and vendor of books upon spiritualism, asking for the address of Mr. *Home*, and stating that she was a firm believer in all he stated in his book, "*Incidents in my Life*."

Having obtained Defendant's address from Mrs. *Burns*, Plaintiff wrote to him, stating her wish to become a subscriber to his *Spiritual Athenæum*. Not receiving any reply, she called upon him on the 2nd or 3rd of October, at his lodgings in *Sloane Street*, and there saw him for the first time. According to the Plaintiff's account (which materially differed from that given by the Defendant) Plaintiff, after being some little time in Defendant's company, was induced by him to believe that a manifestation of the spirit of her deceased husband was taking place through his instrumentality. The *modus operandi* was thus described: "They sat down at the table in the sitting room, and raps came to the table almost immediately. The Defendant said, 'That is a call for the alphabet;' and then repeated the letters of the alphabet from time to time, a rap being given as he arrived each time at the letter intended to be indicated, and so on, until a complete word or sentence was spelled out. In this way the supposed spirit on that occasion spelt out 'My own beloved *Jane*, I am *Charles*, your own beloved husband; I live to bless you, my own precious darling. I am with you always. I love, love, love you as I always did.'" The Plaintiff being much gratified with what she then believed to

be a real manifestation of the spirit of her late husband, asked Defendant to call upon her at her lodgings, 18, *Westbourne Place*, and told him she would give him £10 as her subscription to the *Athenæum*. On the following day (October 4), Defendant called upon the Plaintiff, and almost immediately raps came, indicative, as she was induced by him to believe, of the presence of her husband's spirit. Plaintiff, in return for this manifestation, gave Defendant a cheque for £30, instead of the £10 originally intended, and from this time became much impressed with what she believed to be the power of the Defendant to evoke the spirit of her husband. On the 7th of October, Defendant again called upon Plaintiff. Almost immediately afterwards raps came, indicating the presence of her husband's spirit, and the following message was spelt out: "My own darling *Jane*, I love *Daniel* (meaning, the Defendant *Home*); he is to be our son, he is my son, therefore yours. Do you remember, before I passed I said a change would take place in seven years. That change has taken place; I am happy, happy, happy." It was also spelt out that the departed Mr. *Lyon* wished *Daniel*, as he was to be their son, to be independent, the manner to be indicated another time. Plaintiff then gave Defendant a cheque for £50. At an interview next day it was represented to Plaintiff by the rapping process, that the spirit required her to adopt Defendant, and place him in a position of independence suitable to his rank and position in life as her adopted son, and also that Mr. *S. C. Hall* (the author, and an intimate friend of Defendant) should be sent for. The evidence upon this part of the case, and indeed as to all the early interviews, was in direct conflict, but it appeared that Mr. *Hall* called upon Plaintiff on the 9th of October, and saw her for a short time before *Home* came in. According to Plaintiff's case, at this meeting a message came from the spirit, that Defendant was to be their adopted son; that stock sufficient to produce £700 a year was to be transferred to Defendant as a provision for him; and that she was to hand over her stock receipts to Mr. *Hall*, who would arrange them for that purpose. This was accordingly done, and on the following day, the 10th of October, Plaintiff and Defendant drove in a cab from *Bayswater* to the *City* (constant raps being heard in and about the cab all the way, in testifi-

V.-C. G. 1868 LYON v. HOME.

cation of the spirit's approval); and on getting to the *Bank of England* Plaintiff ("in the full conviction and belief that she was fulfilling the wishes of her deceased husband, communicated to her through the medium of *Home*") executed a transfer to the Defendant of stock representing in value £24,000.

It appeared that on the same or following day Mr. *Home* left *London* for *Brighton*, and afterwards went to *Malvern*, being absent from town for a few weeks, during which Plaintiff sent him a cheque for £20, and was in constant correspondence with him, addressing him as "My dear *Daniel*," "My dear son," "My darling boy," signing herself, "Your affectionate mother," and in one letter she spoke of her late husband as "the best of men, your spiritual father, *Charles Lyon*."

The letters written by the Defendant to the Plaintiff during that and his subsequent absences commenced "My darling mother," and ended, "Your loving son," or "Your affectionate son," and contained several allusions to spiritualism.

On the 1st of November, 1866, Defendant returned to *London*, and the Plaintiff stated that on his first visit to her, while in a trance, something that purported to be her husband's spirit spoke to her through the Defendant, and dictated instructions for a will, by which she was to give all her property to Defendant absolutely. In order to carry out this intention, letters were written by Plaintiff, as she alleged at *Home's* dictation, to the Defendant, *W. M. Wilkinson*, a solicitor in *Lincoln's Inn Fields*, and an intimate friend of *Home*, to prepare the will, and to Dr. *Hawkesley* and Mr. *Rudall*, to secure their presence as attesting witnesses.

On the evening of the 12th of November Mr. *Wilkinson*, accompanied by Mr. *Rudall* and Dr. *Hawkesley*, who acted as attesting witnesses, brought the will prepared in accordance with her instructions. It was read over to the Plaintiff, who then signed it (the Defendant being present, or in an adjoining room). The statement in the bill was, that such will "was, in fact, executed by the Plaintiff at the instigation of the Defendant *D. D. Home*, and while Plaintiff was under the influence of the ascendency and power which he had acquired over her mind by the means and under the circumstances hereinbefore stated."

On the 3rd of December, 1866, the Defendant executed a deed-

poll whereby he declared that he had taken the surname of *Lyon* in lieu of *Home*. This deed was afterwards enrolled in Chancery. On the 10th of December a further transfer of stock, equivalent in value to £6000, was made by Plaintiff into the name of *Home*, and on the 12th of December, 1866, Plaintiff executed a deed-poll whereby, after reciting the gift and transfer to *Home*, and her wish absolutely and irrevocably to vest in the Defendant the absolute use and enjoyment of the moneys thereby given and transferred, she (Plaintiff), in further evidence of such her desire and intention, and to remove all doubts, suspicions, and controversies in that behalf, absolutely and irrevocably declared, that she had made the said gift and transfer of her own free will and pleasure, and without any influence, control, or interference of Defendant or any other person, and that Defendant should stand possessed of, and be entitled to, the £24,000 and £6000 by her transferred for his own absolute use and benefit, without any reservation, condition, trust, or purpose whatsoever.

The next transaction was an assignment and declaration of trust, by indentures dated the 19th of January, 1867, of a sum of £30,000 secured on mortgage of property at *Middlesborough*. The assignment was made to *Wilkinson* as trustee, and the declaration of trust, after reciting the Plaintiff's intention to make a further provision for he adopted son, and absolutely and irrevocably to settle the £30,000 for his benefit, and that by deed of even date she had assigned the said principal sum of £30,000 and interest, and the securities for the same, to the Defendant *Wilkinson* to the intent that he might stand possessed thereof upon the trust thereinafter declared, the Plaintiff did thereby absolutely and irrevocably declare that *Wilkinson* should stand possessed of the £30,000 upon trust to pay the interest to Plaintiff during her life, and, subject thereto, should stand possessed of and interested in the £30,000, in trust for *Daniel Home Lyon* (the Defendant): "Provided also, and Plaintiff did thereby expressly declare, that the settlement thereinbefore expressed to be thereby made by her was absolute and irrevocable, and should in no wise be disputed or controverted by her heirs, executors, or administrators, and that the sum of £30,000 therein mentioned, and the stocks, funds, securities, and estate that might be purchased with or by the said sum or any part thereof, are

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(subject as aforesaid), freely and absolutely given to the said *D. H. Lyon*, without any reservation, condition, or trust whatsoever, and are intended by Plaintiff to be in addition to, and not in lieu of, or substitution for, the £24,000 cash, and £6798 17*s.* 4*d.* £3 per Cent. Consolidated Bank Annuities, so respectively given to her adopted son, *D. H. Lyon*, as aforesaid."

As in the case of the will and deed-poll of the 12th of December, 1866, the bill charged that this indenture was prepared by *Wilkinson* as solicitor for and on behalf of *Home;* that it was not seen or approved of by any solicitor or other independent person for or on behalf of Plaintiff; and that Plaintiff executed the same, and the assignment to *Wilkinson*, "at the request and instigation of *Home*, and while Plaintiff was under the influence of the ascendency and power over her mind which he (*Home*) had acquired by the means and under the circumstances hereinbefore stated."

On the 26th of January *Home* left town for *Hastings*. He returned on the 13th of February, and on the 10th of March went to *Torquay*, and afterwards to *Plymouth*. During these absences a change seems to have come over Mrs. *Lyon*, and her tone towards him was sensibly altered. They corresponded, but from the 19th of March, 1867, she ceased to sign herself, in writing to him, "your affectionate mother."

Defendant returned to town on the 22nd of April, and again left on the 2nd of May, being absent until the 9th of June. In the mean time the Plaintiff had consulted her present legal advisers, and also a spiritual medium, by whom, in a message purporting to come from her deceased husband, she was told that the Defendant was an impostor, and advised to go to law. On the Defendant's return to town, in June, 1867, the Plaintiff demanded back the trust deed of the 19th of January, using most violent language with regard to the Defendant and his friends. The Defendant refused, saying that after the vile charges she had made his hands were closed.

They did not again meet, and on the 15th of June, the Plaintiff filed her bill against *Home* and *Wilkinson*, charging that she had been imposed upon by the Defendant *Home*, and that the several gifts of money, transfers of stock, assignment of the mortgage of £30,000, and declaration of trust for the benefit of *Home*, were

obtained from, and made by, Plaintiff under the influence of the ascendency and power over her mind which had been acquired by the said Defendant. The bill prayed a declaration that these several gifts were obtained by *Home* from Plaintiff by undue means, and were fraudulent and void and not binding upon her; a declaration that a sum of £20,000 invested upon mortgage by *Home* belonged to Plaintiff, and an assignment to her of the debt, or payment of the money; a transfer of the £13,898 consols now remaining in *Home's* name; an assignment by *Wilkinson* of the £30,000 mortgage debt, and a delivery up of the assignment and declaration of trust to be cancelled; an injunction to restrain any dealings by the Defendants with the consols and the mortgage debts of £20,000 and £30,000, and a writ of *ne exeat* against *Home.*

The Plaintiff's case was supported by her own affidavits, and by evidence, the most material part of which was, in substance, as follows:—

Mrs. *Denison*, a niece of Plaintiff's husband, and Mrs. *James Fellowes*, also related to her husband, had both heard Plaintiff repeatedly speak of the change foretold by her husband as to take place in seven years after his death. Mrs. *J. Fellowes* called on Plaintiff one Sunday early in October, 1866, and when she reached the landing outside Plaintiff's sitting room she heard Plaintiff scream out "Oh, my darling, let me see him!" Then came a man's voice, "Don't interrupt me, or I can't proceed." Witness was told that "Mr. *Home*, the spirit-rapper" was with Plaintiff, and went away. A few days afterwards Plaintiff called on witness, described her first interview with *Home*, and mentioned that at such interview her husband's spirit had communicated with her through the mediumship of *Home*, and had knotted her handkerchief. She spoke of further communications (on subsequent occasions) to the effect that she was to adopt Defendant as her son, and that he was to have £700 a year. Witness was, in November, 1866, introduced to Defendant, who was asked by Plaintiff to give a manifestation, but he declined, saying he had a bad headache and must leave. Plaintiff used, in October and November, 1866, frequently to talk to witness about Defendant and his wonderful powers as a spiritual medium, and her adoption of him, and her

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transfer of property to him, both under the directions of her husband's spirit communicated through Defendant.

Daniel Phillips, assistant at Mrs. *Key's* in *Westbourne Place* (where Plaintiff was lodging in October, 1866), remembered Plaintiff on one occasion, early in October, 1866, returning in the evening, stopping in the shop and saying she had been to the *Athenæum*, and shewing a white handkerchief which she said had been knotted by the spirits, or by her husband's spirit. On the Sunday following, Mrs. *Key* having gone out with her husband, Defendant came to see Plaintiff. Witness confirmed Mrs. *Fellowes'* account of the cries and talking heard from Plaintiff's room, and stated that on again going upstairs he distinctly heard rappings and the letters of the alphabet hurriedly repeated by Defendant.

Mrs. *Key* deposed to the excited state in which, on the 2nd of October, 1866, Plaintiff returned, her crying very much, and saying she had been at the *Athenæum*, and that her husband's spirit had been speaking to her, and her shewing a knotted handkerchief which her husband's spirit had tied into knots. Witness took to listening at Plaintiff's door when Defendant came, and deposed to the visit of Mr. *Hall* and Defendant, on the 8th, 9th, or 10th of October; to the noise made by the table or furniture; rapping, repeating the letters of the alphabet, and sundry disjointed fragments of conversation. On the evening of the 8th of November, after Mrs. *Tom Fellowes* had left, witness heard Defendant, who was then alone with Plaintiff, say:—"Write what I will tell you," and something about a will, and taking the name and arms of *Lyon*. On several occasions when she had been listening witness heard Defendant say, "Let us consult father," and there would then be raps, and he would repeat the letters of the alphabet very quickly.

Mrs. *Tom Fellowes* (a niece by marriage of Plaintiff's husband) on the 8th of November, 1866, was told by Plaintiff of *Home's* wonderful power as a spiritual medium, and how she had through his instrumentality been placed in communication with the spirit of her late husband, and under the direction of such spirit, conveyed through the mediumship of Defendant, had adopted Defendant as her son, and transferred property of large amount to him. Witness asked to be allowed to be present at a *séance*.

Home came in the evening, but no "manifestations" took place, Defendant saying "there is something in Mrs. *Fellowes*' presence which forbids it. I cannot do it, mother." Witness left, and next day Plaintiff spoke of a trance into which Defendant fell after witness left the night before, under the influence of which he had dictated letters for her to write to a Mr. *Wilkinson*, Dr. *Hawkesley*, and a friend of Defendant near *Tower Hill*. On the 11th of November, Plaintiff was very open and communicative in telling witness in the presence of Defendant of her disposition of her property, "and he (Defendant) continually checked her, saying it was unnecessary to go into minute particulars. Plaintiff said she wished her niece *Plessy* (meaning myself) to know exactly what she had done, as she had only obeyed her husband's commands, as communicated through the mediumship of Defendant. He, however, twice denied that he had himself had anything to do with the matter."

Mrs. *Sims*, the photographer of *Westbourne Grove*, a believer in spiritualism, confirmed the statements made by Plaintiff as to the introduction to her by witness of the subject of spiritualism, and of the name of the Defendant *Home*. The account given to her by Plaintiff during the first fortnight in October of what passed in her interviews with Defendant, agreed with the statements made by Plaintiff in her affidavit. Witness also deposed to the "knotted handkerchief."

Mrs. *Pepper* (with whom Plaintiff had lodged since November, 1866, and for about five years from January, 1861), deposed that in November, 1866, Plaintiff was full of the wonderful things done by the spirits through the Defendant's mediumship; how she had had through him communications with her deceased husband, and that the deceased had given her this son to take care of her in her old age. The Defendant seemed uneasy in his manner and stopped the conversation. On the 26th of November Plaintiff shewed witness the knotted handkerchief. She also told her of the communication from the spirit, that Defendant was his son, and therefore her son, and of the fortune which she had bestowed upon Defendant in consequence of the orders of the spirit, and about the will made in favour of Defendant at the dictation of the spirit.

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Amongst other documentary evidence in the case were certain memorandum books, partly in the Defendant's handwriting. One of these, which was referred to as book *B.*, purported to contain accounts of the spiritual experiences of the Plaintiff, and communications to her since her first acquaintance with the Defendant, in the form of a dialogue between herself and her deceased husband. This book was full of extravagant expressions of affection on the part of "*Charles*" for his "darling *Jane*," allusions to his presence at her side; and in reference to "our beloved son," occurred the following passage:—

"I will tell you when I wish another medium than our son. It stands to reason *Daniel* is the best medium on earth; we have chosen him for you. What we have to say, and what we have to do, we can both say and do through him."

In explanation of this book, Defendant stated that Plaintiff had, in the first instance, concocted these accounts of spiritual experiences in order to gain *éclat* as one highly gifted, and then got him to copy out these pretended revelations (partly from written papers and partly from her dictation), which latterly were artfully designed for the purpose of having him in her power. Another of these memorandum books, which had been partially destroyed, contained Defendant's account of their first acquaintance, and this account was, it appeared, read by Defendant in presence of Plaintiff to a Mr. *Shorter*. Plaintiff stated that she had destroyed portions of this book because the contents were untrue and annoyed her, and that she had since written in her own account, and comments upon Defendant's conduct. She denied having given an unqualified assent to Defendant's account, though she did not tell Mr. *Shorter* it was false, as Defendant had particularly requested her, before *Shorter* came in, not to say anything about it.

In his answer, the Defendant *Home* stated that he was born in 1833. From his childhood he had been subject to occasional phenomena in his presence, not produced by himself or under his control, but occurring irregularly, and even during sleep. His will had nothing to do with them, and he could not account for them further than by supposing them to be effected by intelligent beings or spirits. These phenomena had been witnessed by many royal and distinguished personages, who had sought his acquaintance on

account of them, and received him as a guest and friend. He never took money in respect of these phenomena; was not in the habit of receiving strangers, and never forced the subject of spiritualism on any one's attention. The Defendant swore that he did not produce these phenomena, or in any way whatever aid in producing them; and that he did not profess, and never did profess, to have the power of evoking the spirits of deceased persons, or of putting other persons in communication with them. Some of his friends, who were desirous of investigating these phenomena, established the *Spiritual Athenæum*, at 22, *Sloane Street*, and he became resident secretary, with a salary. On Monday, the 1st of October, 1866, he received a letter signed *Jane Lyon*, of whom he had never heard before, requesting to be furnished with the terms of admission to the *Spiritual Athenæum*. He laid this letter before the executive committee, and on the next day Plaintiff called and entered into conversation with him about his book, "*Incidents in my Life*," and said that she had been a believer from her childhood in such phenomena, and that she was a much more wonderful medium than himself. She appeared, however, to dwell much more on his aristocratic friends "them high folks," than on spiritualism, and said that it was a pity he should be poor, and asked him to call on her the following day to talk over her subscription to the *Athenæum*. The defendant had no idea that she could be rich, and no allusion whatever was made to Plaintiff's late husband, and no spiritual manifestation whatever took place. On leaving, Plaintiff asked him for his portrait, which he gave her. On the 4th of October, *Home* called on Plaintiff, when she told him of her wealth, and said that she would settle a handsome fortune on him. She gave him a cheque for £30, and, on his refusing it, said it was for the *Athenæum*. After questioning him as to his past life, she asked whether, if he married again, his wife would be received by the great people he knew. She told him her own history; that a change was to come over her seven years after her husband's death, which she now thought was not her death (as she used to suppose), but that she should adopt *Home* as her son. During this conversation *Home* said, "I fear you seek me for the strange gift I possess." She said, "Have I ever alluded to that? It is true that will bring people about you, and that is what I want. I

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shall like to see your friends, and nothing will spite my husband's family more than to see me amongst great folks." During this interview there were no manifestations, but Plaintiff threw her arms round his neck, kissed him, and called him darling. On the 7th of October, Plaintiff called upon him and pressed upon him a cheque for £50; told him that she had resolved to adopt him and pay to his account £24,000 on the 11th; that she had originally intended it to be £30,000, but had resolved to give him £700 a-year to begin with, to see how they got on together; and that if she found him all she expected, she would give him much more afterwards. At this interview Plaintiff discovered that she had seen *Home* in visions for many years, the only difference being that the hair of the vision was more golden than *Home's*. She went on to say:—"Why, even my father before he died told me I should adopt a son, and I will have no one but you; and whether you will or no, I shall settle a fortune on you, and you will be obliged to accept it." On her proposed adoption of him, *Home* replied that he would call her mother, as he did many old ladies. She seemed to be offended at the idea of his giving her only a divided homage, and even then contemplated the possibility of warmer relations. She then suggested that she should call with *Home*, or some of his friends, or a solicitor, to talk the matter over with them, to which he assented. She then offered him a cheque for £50, which he at first refused to take, saying that he did not like to take money for his strange gift. She said that she had seen nothing of his strange gift, and though it was through his being celebrated for that that she had first heard of him—now that she knew him she loved him for himself. He was prevailed upon to take the cheque. As he rose to go, there came sounds known as "rapping." A call for the alphabet was made, and the following sentence spelled out:—"Do not, my darling *Jane* say, 'Alas! the light of other days for ever fled,' the light is with you, *Charles* lives and loves you." These sounds were not produced by Defendant. He was not near the table when they occurred. Plaintiff alone was seated at the table. He did not seek to influence her in any way whatever, and did not induce her to believe she was having communication with the spirit of her husband. On the 8th of October, *Home* again called upon Plaintiff, and offered her the

cheque back again, but she shed tears, and ultimately prevailed on him to take it. She also told him that she would make a new will, and leave her fortune to him contingently on his taking her name. He went and cashed the cheque, and on his return to his rooms found the Plaintiff, by appointment, waiting for him. She asked him which of his friends "a clever business man" could see her, that she might talk the matter over with him, and he suggested Mr. *S. C. Hall*, the author; but he denied that (as alleged by her) *Hall's* name was spelt out by the spirits, or that there were any manifestations at this interview. On the next day Mr. *Hall* called on him, and was, with difficulty, persuaded to see the Plaintiff, and did go. On his return, *Hall* was much agitated, saying it was the most wonderful thing he ever heard of; that she wouldn't speak about spiritualism, but was determined to settle large sums on *Home*. Finding from Mr. *Hall* that he thought her not only sane, but a very sharp business woman, *Home* decided to accept what she offered. On visiting her next day (10th of October), he begged her to delay for a time, but she said she had so fully decided on giving him £700 a-year, that nothing would stop her; and the letter, which she had written to him for the last time in his name of *Home*, was to prove why she did so.

The letter was as follows:—

"10th October, 1866. "18, *Westbourne Place, Hyde Park.*

"My dear Mr. *Home*,—I have a desire to render you *independent* of the world, and having *ample* means for the purpose without abstracting from any needs or *comforts* of my own, I have the greatest satisfaction in now presenting you with, and as an *entirely* FREE GIFT from me, the sum of £24,000, and am,

"My dear Sir, yours very truly and *respectfully*,

"*Jane Lyon.*"

When Mr. *Hall* came, he also urged her to take time; but Plaintiff only said, "What is £24,000 to me in comparison with having a son that I can love, and who will be kind to me?"

The answer proceeded at great length with the Defendant's version of the circumstances attending the transfer of the £24,000, adducing in support the evidence of the stockbrokers who were employed in the transaction, and others, as to the ostentatious

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way in which the Plaintiff proclaimed to them her affection for the Defendant, and her intention to adopt him and give him a fortune, and also described the subsequent transactions between himself and the Plaintiff, down to the filing of the bill in June, 1867. An unqualified denial was given to the statements of the Plaintiff as to the influence, ascendency, and power acquired by him over her through his pretended spiritual powers, and to the charge that her gifts were made in obedience to supposed spiritual communications from her deceased husband through the medium of *Home*. So far from having exercised any influence over her, he had only sought to persuade her against her own impulse and desire to force upon him a position of wealth. The Defendant asserted that there had not been any spiritual manifestations, except very rarely—"certainly not more than two or three times when we were alone together," and that whatever communications were at any time apparently given were caused by Plaintiff herself (who used to boast of her visions and manifestations, and often said, "I am gifted with a knowledge you have not") if they were caused by anybody. The Defendant denied having dictated the will of November, 1866, or the instructions given by the Plaintiff to *Wilkinson* in reference thereto or to the transaction as to the mortgage, and also denied having on any occasion given any instructions or suggestions whatever to *Wilkinson* concerning the Plaintiff or her business, or having ever alluded to it. The Defendant also referred to the Plaintiff's own statements to many of his friends that she had to urge Defendant to take her money, and that spiritualism had nothing whatever to do with it.

In order to account for Plaintiff's extraordinary liberality to him the Defendant suggested as her leading motive her desire to emerge from her position of dull and friendless obscurity, and to be received by his means into aristocratic society, thereby spiting her husband's relatives, whom she disliked, and acquiring notoriety for herself by the largeness of her gifts. It was also suggested by the Defendant that the Plaintiff contemplated other relations with him than those of mother and son, and that upon his persistent rejection of her advances, and when also, from his prolonged absences from *London* and constant ill health, her hopes of figuring in high society became disappointed, her affection had changed to

hate, and she had turned against him and determined to recall her gifts, and if possible to ruin his good name.

In support of his case Defendant had brought forward some forty witnesses, most of them believers in spiritualism, including Mr. *S. C. Hall* (who confirmed the statements in the answer, and deposed to interviews and conversations with the Plaintiff on the 9th of October and other occasions), *Robert Chambers, Gerald Massey*, and other literary persons. This evidence went to confirm the statements of *Home*, and to discredit Plaintiff's affidavits; her own statements to these witnesses being adduced, in which she repeatedly denied that there were any manifestations at the early interviews, or that spiritualism had anything whatever to do with her gifts to the Defendant, which were made (so she asserted) of her own free choice, and without any influence whatever, or any dictation from any spiritual being. The witnesses also deposed to the shrewd capacity of the Plaintiff in business matters, and to the inconsistency of her conduct as observed by them with any notion of influence exercised over her by *Home*.

Mr. *Wilkinson*, who had been made a Defendant for the purpose of formal relief only, had filed an answer, in which he stated his surprise at the statements made by the Plaintiff, and the care that he had taken to protect her against injuring herself by giving away her property without the fullest determination on her part, his advice that she should consult some other solicitor, his remonstrances with her against giving so large an amount to a mere stranger to the entire exclusion of her husband's relatives, and the distinct explanations given by him of the legal consequences of what she was doing. A long correspondence between himself and Plaintiff in reference to all these transactions, which were at the time most fully discussed between them, was set out by *Wilkinson*, who also stated that the Plaintiff always assured him that she was attached to *Home* for his own sake, wholly apart from any such phenomena or communications. Mr. *Wilkinson* also gave his own views on the subject of spiritualism, in which he is a believer, and confirmed *Home's* statement that he had always repudiated the notion that he possessed any power of evoking the spirits of deceased persons or of putting other persons in communication with them. It was untrue, as stated by Plaintiff, that he (*Wilkinson*)

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was ever present when any instructions were received from her husband's spirit with reference to the deeds. "The only occasion on which I saw any phenomena in her presence was one evening, after I had taken my hat to leave, she asked me to remain a few minutes, which I did, and there were some movements of the table and rapping, but there were no directions nor instructions relating to the said deeds."

In reference to the letters set out by *Wilkinson*, and her letter of the 10th October to *Home*, the explanation given by the Plaintiff was that they were all written by her either from drafts put before her by *Home*, or from his dictation, or under the "magnetic influence" to which she was subjected by him.

The Plaintiff was cross-examined at great length at the hearing, and the unfavourable effect of this cross-examination upon the credit of her previous statements was adverted to by His Honour in his judgment.

The Defendant *Home* was also cross-examined, and stated that the strange manifestations occurring to him, but over which he had no control, were communications with the spiritual world; that he had seen and conversed orally with spirits, and that at other times rappings (which he ascribed to spirits) were heard; that on his reading over the alphabet, the rappings indicated "yes" or "no," and so spelt out communications, and that the mode of signalling (generally one rap for yes, and three for no) could be arranged with the spirits verbally before commencing. He also said that he and other persons had floated in the air by the agency of the spirits, and that tables and chairs had been moved bodily in the same way, in violation of the laws of gravity.

Mr. *Wilkinson* was not cross-examined, nor were any of the witnesses for the defence.

Mr. *W. M. James*, Q.C., Mr. *Druce*, Q.C., and Mr. *Fischer*, for the Plaintiff:—

Upon the general principle, "applying to all the variety of relations in which dominion may be exercised by one person over another," no gift which has been made under the influence of so monstrous a delusion as is shewn to have existed in Plaintiff's mind can be sustained. Without casting any imputation upon the De-

fendant *Wilkinson*, it was, to say the least, most unfortunate that he, a friend of *Home*, with such strongly pronounced spiritual proclivities, and consequently incapable of viewing the matter in its true light, should alone have been employed to prepare the will and subsequent deeds. It is immaterial whether the delusions and superstitious theories of the Plaintiff were already existing before she met *Home*, or were produced by his contrivance; it is enough if he acted upon them. That he has done so is shewn conclusively, and the Court will not permit the retention of property thus improperly obtained, and will protect the public against this new and most dangerous species of fraud: *Hatch* v. *Hatch* (1); *Bridgman* v. *Green* (2); *Huguenin* v. *Baseley* (3), and the cases referred to in the note to *Tudor's* Leading Cases in Equity (4); *Dent* v. *Bennett* (5); *Norton* v. *Relly* (6); *Nottidge* v. *Prince* (7); *Smith* v. *Tebbitt* (8); *Œuvres d'Aguesseau* (9) (*La Cause des Héritiers de la Dame de Vaugermain contre les Religieuses du Saint-Sacrement*); *Ibid.* (10) (*La Cause des Religieuses Ursulines de Castel-Sarrazin contre Guillaume Gabriel de Charron intimé, et Jean de Charron intervenant.*)

Mr. *Henry Matthews*, Q.C., Mr. *Fitzroy Kelly*, and Mr. *Charles Walker*, for the Defendant *Home*:—

It has been assumed on behalf of the Plaintiff that the burden of supporting these transactions rests upon the Defendant; but in all cases where the relationship of trustee and *cestui que trust.* parent and child, guardian and ward, solicitor and client, does not subsist, and the gift is made to a mere stranger, the confidence and the influence must be proved extrinsically: *Smith* v. *Kay* (11); *Hunter* v. *Atkins* (12). The Plaintiff has altogether failed to prove that she was the victim of any undue overwhelming influence, and unless the belief in spiritualism avowed by the Defendant is in itself such a badge of fraud as to taint every transaction resting upon it, the case is not within the authorities that have been cited;

(1) 9 Ves. 292.
(2) 2 Ves. Sen. 627.
(3) 14 Ves. 273.
(4) Vol. ii. p. 486.
(5) 4 My. & Cr. 269.
(6) 2 Eden, 286.
(7) 6 Jur. (N.S.) 1066.
(8) Law Rep. 1 P. & D. 398.
(9) Tom. i. p. 284.
(10) Tom. v. p. 514.
(11) 7 H. L. C. 750, 779.
(12) 3 My. & K. 113.

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and these gifts, made deliberately and after full consultation with a solicitor who warned her against her own excessive liberality, cannot be set aside.

[The argument was principally directed to the evidence, from which it was contended that the truth of the account given by the Defendant denying the exercise of any spiritual influence over the Plaintiff, and accounting for her bounty by their antecedents, and by the warm affection which she at first entertained for him, was conclusively established.]

Mr. *Kay*, Q.C., and Mr. *Godfrey Lushington*, for the Defendant *Wilkinson*, on the intimation of His Honour's opinion that no charges had been made against Mr. *Wilkinson*, beyond that he did his best to make the deeds effectual, and was a friend of *Home*, took no part in the argument.

Mr. *W. M. James*, in reply.

May 22. SIR G. M. GIFFARD, V.C., after stating the object of the suit, the antecedents of the Plaintiff, her expectation of death in the autumn of 1866, and the effect produced upon her by reading *Home's* book, "*Incidents in my Life*;" and after referring at length to the account of himself and of the several transactions given by *Home* in his answer and his explanation in cross-examination of the mode in which the spirits make their communications, to the more material portions of *Wilkinson's* answer, to the evidence on behalf of the Plaintiff by Mrs. *Tom Fellowes*, Mrs. *James Fellowes*, and *Daniel Phillips*, and to portions of the evidence on behalf of the Defendant, continued:—

I have now gone through the case made by the Defendant, so far as I think it necessary to do so, having only stopped by the way to refer to his cross-examination (explaining the mode in which the spirits make their communications), to the evidence of Mrs. *Tom Fellowes*, Mrs. *James Fellowes*, and of *Daniel Phillips*, and to the contents of some documents in the Defendant's handwriting (especially book *B*), and of some letters written by him to the

Plaintiff, which are not referred to in the answer. To this I may add that there is evidence, besides Mrs. *Tom Fellowes*' affidavit, of Plaintiff having, as early as November, 1866, referred the adoption of the Defendant and her bounty to the spirit of her husband, and I am satisfied that this was not an afterthought. Statements, except such as were made in the presence of the Defendant, I need hardly say are, of course, not evidence of the facts stated. I have not gone through the affidavits made by the Plaintiff herself, or her cross-examination, because I think no one could have read those affidavits, contrasted them with the evidence adduced on the part of the Defendant, and heard that cross-examination, without coming to the conclusion that reliance cannot be placed on her testimony, and that it would be unjust to found on it a decree against any man, save in so far as what she has sworn to may be corroborated by written documents, or unimpeached witnesses, or incontrovertible facts. Much, however, as I distrust all that the Plaintiff has said, and much as I suspect what she has done in contemplation of the suit, I do not hesitate to say that I disbelieve the allegation made by the Defendant that the Plaintiff turned against him because "he refused to accept any other relations than those of mother and son." Even if this had been true, it would not have assisted him, but the statements and letters of the Plaintiff, as proved on behalf of the Defendant, are at variance with this, and every letter and every act of the Defendant and every communication, spiritual or otherwise, inconsistent with any such notion. I forbear, however, to pursue this part of the case further, and turn to consider—first, whether the merits are so before the Court as to enable it to decide on them, and, if so, then what the law is as applicable to cases of this description, and, bearing that law in mind, the result of the facts and evidence. With respect to the merits being before the Court, I certainly could have wished that the bill had been somewhat differently framed; that it had contained the material or most of the material allegations in the affidavits of the Plaintiff's principal witnesses, and an explicit reference to the book *B*, and to the extract from the destroyed book. Considering, however, the contents of the Defendant's answer, of his concise statements and interrogatories, and of the Plaintiff's answer to those interrogatories, considering

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that the Plaintiff and Defendant were each cross-examined, and each cross-examined with reference to the statements of the various witnesses, and adding to this that there was a motion on the part of the Defendant for the admission of new evidence on the ground of surprise, which was substantially successful, I think that there was no issue or material allegation of fact of which each side was not sufficiently apprised and had not the opportunity of meeting, and, this being so, that all the requirements of justice are answered in this respect. Then, as regards the law, the question is not as to the validity of a will, but whether two gifts, one to the amount of £30,000 actually transferred, and the other to the amount of £30,000 in reversion, each irrevocable and without consideration, supported by deeds, are or are not to be upheld. On this I will first of all refer to what has been said in two cases by Lord *Eldon* and Lord *Cottenham*. In *Hatch* v. *Hatch* (1), Lord *Eldon* said:—"This case proves the wisdom of the Court in saying, 'It is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand purporting to be bounty.' . . . The Court cannot permit it except quite satisfied that it is an act of . . . a rational consideration, an act of pure volition uninfluenced; and that inquiry is so easily baffled in a Court of justice, that, instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind misled by undue kindness or forced by oppression. . . . Therefore, if the Court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud."

Lord *Cottenham* in *Dent* v. *Bennett* (2), which was the case of a medical man, observed:—"It was argued upon the authority of the civil law and of some reported cases, that medical attendants were, upon questions of this kind, within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy. Undoubtedly they are; but I will not narrow the rule, or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of this Court, by any enumeration of the description of persons against whom it ought to be most freely exercised. The relief—as Sir *S. Romilly* says in his celebrated

(1) 9 Ves. 292, 296. (2) 4 My. & Cr. 269, 276.

reply in *Huguenin* v. *Baseley* (1)—the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another."

Huguenin v. *Baseley* was the case of a minister of religion. The question then arises, was the relation of the Defendant to the Plaintiff during these transactions at all analogous to those which are referred to by Lord *Eldon* and Lord *Cottenham?* I answer that it has been proved to be so. At the outset, the result of the evidence of Mrs. *Pepper*, Mrs. *Denison*, and Mrs. *Sims* is, that the Plaintiff was greatly attached to her husband; that her husband had told her that a change would take place in seven years from his death, and that they would meet; that she consequently expected her own death in the autumn of 1866, and was told that if she became a spiritualist that need not be, but he would come to her; that she took to reading books on spiritualism, among others, the "*Incidents in my* (Defendant's) *Life*," and became desirous of meeting the Defendant. Then Mr. *Burns* proves the letter of September, 1866, in which she writes with reference to the Defendant, "I am a firm believer in all he states in his book, and consider him highly favoured by the Most High God." Besides this, the Plaintiff is proved to have been superstitious and eminently affected by dreams and visions, particularly by the vision of the golden-haired boy. I am satisfied, in spite of what she said on cross-examination, that she was deeply impressed with that vision, and felt it as a reality. Moreover, she had been told by her father that she would adopt a son, and it was with a mind saturated with all this that she sought the Defendant because of that which she terms "his strange gift." I have read from his answer the Defendant's account of himself. On the 2nd of October, according to the answer, the incidents in the Defendant's life were alluded to. On the 4th he called on the Plaintiff, and became acquainted with her antecedents, birth, parentage, marriage, wealth, and other circumstances. He was then told by the Plaintiff "that previous to her late husband's death he told her a change would come over her in seven years, and that she thought it meant her death, but that now she thought the event to occur was that she was to meet and adopt the Defendant." On the 7th £30,000 is alluded to and

(1) 14 Ves. 273.

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£24,000 promised. The Plaintiff is represented by the Defendant as saying, "Why, I have seen you in visions these many years, and the only difference was that your hair was lighter, more of a golden yellow, than it now is—many years ago, even before you could have been born. Why, even my father before he died told me I should adopt a son." With reference to this we find in one of the Defendant's letters a communication signed with the initials "*M. G.*" as betokening her father, which is as follows:—"The spirits say, 'Dear *Daniel*, be patient and hopeful; you are recovering, and, with care, will have many years of usefulness on earth. Your mother, my darling *Jane*, is well, and we are near her at all times.'" At this same interview of the 7th of October the Defendant tells us there came sounds known as rapping. A call for the alphabet was made, and the following sentence, or words nearly similar, spelt out:—"Do not, my darling *Jane*, say 'Alas! the light of days for ever fled;' the light is with you, *Charles* lives and loves you." This is the Defendant's own account. Whether there were or were not what are called manifestations before the 7th, there were certainly manifestations then and on the 8th, and manifestations far beyond any admitted by the Defendant. "On the 11th," says the Defendant, "I called at her request, and we went to the *City* in a cab. There were no manifestations. The Plaintiff sat very near me, with my hands in hers, under her shawl, all the way to the *City*." On this occasion the £24,000 was transferred, and the Defendant spoken of by the Plaintiff at the bankers and brokers as her adopted son. This, without more, is in my judgment enough to throw upon the Defendant the *onus* of proving that the Plaintiff's acts were the pure, voluntary, well-understood acts of her mind, unaffected by the least speck of imposition or undue influence, or, as Lord *Eldon* has expressed it, "acts of rational consideration, of pure volition, uninfluenced." But the case does not stop here. The Defendant states himself to be what is called "a medium." Mr. *Wilkinson* casually saw the Plaintiff and Defendant sitting at a table, and the Defendant acting as a medium, and it is to be inferred that this was nothing unusual or uncommon, not only from this circumstance, but from Mrs. *Tom Fellowes*' affidavit, in which she says she went by the Plaintiff's appointment to meet the Defendant at the Plaintiff's lodgings, "and

he came accordingly, and after a short time we all three sat at the table for a *séance*, the Plaintiff asking the Defendant to seat himself at his own place at the table, and to begin to call the spirits;" and from Mrs. *James Fellowes*' affidavit, in which she says, after alluding to her introduction to the Defendant, that "the Plaintiff said to him, 'Let us have a manifestation,' but he said he could not, as he had a bad headache and must leave." I am aware that the Defendant has been cross-examined as to these and other parts of these affidavits, and of the extent to which he has contradicted them, but Mrs. *James Fellowes* and Mrs. *Tom Fellowes* were cross-examined, and I am satisfied that they are both the witnesses of truth, and in every sense, as regards memory and otherwise, quite reliable. I am satisfied, too, that much more occurred on Sunday, the 7th of October, 1866, in the shape of manifestations and communications, than the Defendant admits. Even on his own admission, what did occur had reference to the Plaintiff's husband. I am satisfied that the representations made by the Plaintiff to Mrs. *Tom Fellowes* in the Defendant's presence were according to the facts, and that Mrs. *Tom Fellowes* is accurate when she says in the 7th paragraph of her affidavit:—"On this occasion the Plaintiff was very open and communicative in telling me in the presence of the Defendant of her disposition of her property, and he continually checked her, saying it was unnecessary to go into minute particulars, and the Plaintiff said she wished *Plessy* (meaning myself) to know exactly what she had done, as she had only obeyed her husband's commands as communicated by his spirit through the mediumship of the Defendant. He, however, then denied that he had himself had anything to do with the matter. I remember also that on this occasion the Defendant asked me whether I had never lost any one very dear to me, into whose presence I should like to be brought again." I cannot take the Defendant's denial, so referred to, to mean more than that the communications from the Plaintiff's husband were not caused by any act or volition of the Defendant—this being in truth consistent with what he represents as his "strange gift." Then the Defendant, in his cross-examination, swears that he has seen spirits; that he has conversed with them orally; that in his presence tables and chairs have been moved bodily, in violation of the rules of gravity, and that he himself has

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floated in the air; and on being asked how the spirits communicate to a medium, when they communicate by knocking, he says:—"Strange sounds are heard like a rapping sound. The alphabet is called or pointed out in some instances, and when a sound is given that indicates that that letter is to be written down. I have no alphabet to be used for this purpose—they can be called orally as well as pointed out. We go through A, B, C, D, and so on, and when the right letter is arrived at the spirit gives a knock. The knocks are both affirmative and negative—one signifies 'No,' and three signifies 'Yes,' but you can arrange that as you please."

Add to this the antecedents of the Plaintiff and Defendant, the Defendant's letters from which I have read extracts, the page from the destroyed book, and the book *B*, in his handwriting; then consider that a woman past seventy, within eleven days after first seeing the Defendant, mentioned £30,000, and actually transferred £24,000 to him, and followed this gift by a will in his favour, then a gift of £6000, and then of a reversionary interest in £30,000 more, and assuredly there is proof of transactions which ought to be watched with what Lord *Eldon* termed "a jealousy almost invincible," proof which throws on the Defendant the whole onus of supporting such gifts. I have already read the Defendant's statements and explanations from his answer and affidavits with reference to the book *B* (I have read extracts from the book itself). I am altogether dissatisfied with those statements and explanations. The contents of the book disprove them. It is said, however, that the Plaintiff's desire to be introduced into the society in which the Defendant moved prevailed much with her; that her testimony is not to be relied on; that there is not only what the Defendant has sworn to, but Mr. *Wilkinson's* answer, and evidence of many witnesses besides his to which weight is due; that the Plaintiff professed herself to be "a medium;" that she still deals in spiritualism; that the Defendant was under her influence, not she under his; that she had the advantage of independent advice —Mr. *Hall's*, Mr. *Jencken's*, Mr. *Wilkinson's;* that she is a person of business habits and business knowledge; that the letters, commencing with that of the 10th of October, 1866, were entirely her own; and that she herself has stated and admitted to Mr. *Wilkinson*, and other persons, that the transactions were not connected

with spiritualism. I agree that she did so state to Mr. *Wilkinson* and other persons. I have said that I cannot rely on her testimony. She seems to have had to do with spiritualism in connection with this very suit, but her desire to be introduced into the society in which the Defendant moved was clearly not such an inducement as to account for what she did, or the main inducement; and when it is said that the Defendant was under her influence, not she under his, I disagree entirely. The facts I have recapitulated, the letters I have read, the Defendant's appearance here in Court, the antecedents of both parties, and the statements in the Defendant's answer of what occurred when and after he and the Plaintiff quarrelled, lead irresistibly to a widely different conclusion. As to the Plaintiff's admissions and statements that the transactions were unconnected with spiritualism, for some months she was as anxious as the Defendant to support the gifts—I may say obstinately desirous of supporting them. From her oral communications with Mr. *Wilkinson* (these commenced on the 12th of November, after her conversation with Mrs. *Tom Fellowes*) she was aware of the danger of referring what she did to spiritualism. These circumstances and her peculiar character, and the knowledge or suspicion that her sanity might be questioned, sufficiently account for what she said and did as deposed to by the various witnesses. Besides which, the Defendant was generally present, and by no means unaware of the value of anything which might be deemed confirmatory. I am satisfied that the statements and admissions to the effect that the transactions had nothing to do with spiritualism were not according to the fact. As to the Plaintiff professing to be a medium, she said this, and almost anything which occurred to her from time to time as seeming likely to make her of importance to those with whom she was conversing. But the Defendant has been proved to be the person who acted as the "medium." There is no proof of the Plaintiff having ever so acted, nor do I believe she did. True it is, however, that she has business habits and a knowledge of business, but obviously a limited capacity—very limited as compared with the Defendant's —and though I disregard her statements as to her letters, and think her quite able of herself to have composed the letters she wrote to Mr. *Wilkinson*; the letter of the 10th of October, begin-

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ning "My dear Mr. *Home*," and ending "Yours very truly and respectfully, *Jane Lyon*," is at singular variance with what she said at the banker's and the broker's the day after with reference to the adoption of the Defendant as a son, and with what the Defendant represents her as having said to himself both on the 11th and at the interview on the 7th of October. This letter has not been satisfactorily explained or accounted for. As to the independent advice, the relation between the Plaintiff and Defendant remained unaltered throughout. He was in constant communication with her. Both parties expected that what was being done would be questioned by the husband's relations. Sanity was talked of. Precautions were taken that questions of the kind might be met, if raised. Nothing like a power of revocation was ever suggested, though this would have added much to the validity of the deeds, and to the control of the Plaintiff over the Defendant, and, besides, I think it a just and sound observation that all that was done was much more by way of caution against what others might do than by way of protection to the Plaintiff against her own folly and infatuation. There had been acts of confirmation in *Bridgman* v. *Green* (1), but Lord Chief Justice *Wilmot* said: "In cases of forgery, instructions under the hand of the person whose deed or will is supposed to be forged to the same effect as the deed or will are very material; but in cases of undue influence and imposition they prove nothing, for the same power which produces one produces the other; and, therefore, instead of removing such an imputation, it is rather an additional evidence of it." In *Huguenin* v. *Baseley* (2) there was the answer of the solicitor who prepared the deed, but with reference to this Lord *Eldon* said: "There is in this case an attempt to shew why there was not a power of revocation, and that is a part of the transaction one of the most liable to objection. The evidence and answer of the attorney go to this distinctly, that she informed him she was to have all her affairs arranged. He was struck with the circumstance of her making an irrevocable deed, and told her that she should make a will." And in another part of the judgment he said: "I am bound to look at all the circumstances that led to the execution of a voluntary instrument, and to observe

(1) 2 Ves. Sen. 627. (2) 14 Ves. 273, 296.

that the attorney did not state this improvident act to the brother of this lady, or, as Lord Chief Justice *Wilmot* says, go and talk both to the grantor and grantee upon it." There was no suggestion of a power of revocation or of communication with any of the husband's relations, or any question asked or inquiry made of the Defendant, and on the 19th of January, 1867, when the last of the deeds was being read over and executed, the Defendant says (this being his account, varying from the Plaintiff's): "She afterwards called me to her, and, kicking a footstool from under the table, pointed for me to kneel there. I did so, close to her, and she put her left arm round my neck, and fondled my cheek, while they were reading the parchments." I have already said that in my opinion the onus of supporting the gifts and deeds rests entirely on the Defendant; to this I now add, for the reasons I have given, and having regard to the facts and evidence I have gone through, that in my judgment he has not made or proved such a case as is requisite for their support. There must, therefore, be a declaration in the usual form that the gifts and deeds are fraudulent and void; there must be the necessary transfers and assignments to the Plaintiff, and an account against the Defendant.

There remain the costs to be disposed of. The Plaintiff and her counsel agreed that they had no case against Mr. *Wilkinson*, and that his costs must be paid by her. This, of course, must be done. Under any but exceptional circumstances these costs would be recovered over against the Defendant, and he would pay all the other costs of the suit. The expenses, however, have been very seriously increased: first, by the unwarrantable attack, in the Plaintiff's affidavits, on Mr. *Wilkinson;* and, secondly, by her innumerable misstatements in many important particulars—misstatements on oath so perversely untrue that they have embarrassed the Court to a great degree, and quite discredited the Plaintiff's testimony. The Plaintiff, therefore, must bear Mr. *Wilkinson's* costs and her own; the Defendant will escape these costs.

I have now only a few words to say in conclusion. I know nothing of what is called "spiritualism" otherwise than from the evidence before me, nor would it be right that I should advert to it, except as portrayed by that evidence. It is not for me to con-

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jecture what may or may not be the effect of a peculiar nervous organization, or how far that effect may be communicated to others, or how far some things may appear to some minds as supernatural realities, which to ordinary minds and senses are not real. But as regards the manifestations and communications referred to in this cause I have to observe, in the first place, that they were brought about by some means or other after, and in consequence of, the Defendant's presence, how there is no proof to shew; in the next, that they tended to give the Defendant influence over the Plaintiff, as well as pecuniary benefit; in the next, that the system, as presented by the evidence, is mischievous nonsense, well calculated, on the one hand, to delude the vain, the weak, the foolish, and the superstitious; and, on the other, to assist the projects of the needy and of the adventurer; and, lastly, that beyond all doubt there is plain law enough and plain sense enough to forbid and prevent the retention of acquisitions such as these by any "medium," whether with or without a strange gift; and that this should be so is of public concern, and, to use the words of Lord *Hardwicke*, "of the highest public utility."

Solicitors: Messrs. *Druce, Sons, and Jackson;* Mr. *W. M. Wilkinson*; Mr. *W. J. Wilkinson.*

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An arrangement for the transfer of the business of company *A.* to company *B.*, by which, in addition to having their liabilities per share raised from £50 to £100, the shareholders of company *A.* can only obtain shares in company *B.* upon payment of £6 premium per share, is not a valid sale or arrangement within the provisions of sect. 161.

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Held, that the will operated as an execution of the power in favour of the executor for the purpose of paying the testatrix's debts, funeral and testamentary expenses, and legacies, and that only so much of the property, the subject of the power, as remained after making those payments, passed by the residuary bequest.

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Held, that the moneys recovered from the estate were to be attributed to capital, but that the future income thereof ought to be paid to the tenant for life.

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In 1826 land was granted for ecclesiastical purposes to the Church Building Commissioners, and on a portion of this land *Trinity Church* was built. The remainder of the land was consecrated as a burial-ground, but it had ever since the consecration been intended to reserve a portion as a site for a parsonage when funds for building could be obtained. The burial-ground had, before the date of the will, been closed by Act of Parliament, and the portion intended as a site for a parsonage had been used by the incumbents of the church as a garden:—

Held, that the bequest was good to the full extent, and not merely to the limit of £500 allowed by 43 Geo. 3, c. 108.

2. Testatrix, by a testamentary paper described as a codicil, gave "£200 to *Brompton Church*, to be disposed of as Dr. *Irons* pleases." One of the witnesses to the execution of this paper by the testatrix was the wife of Dr. *Irons*:—

Held, that as Dr. *Irons* was a mere trustee for *Brompton Church*, the bequest was not invalidated under the *Wills Act*, s. 15, by the attestation of his wife.

3. Circumstances under which repeated legacies were held cumulative and not substitutional.

CRESSWELL *v.* CRESSWELL 69

ATTORNEY-GENERAL, when he must be a party 177
See PRIVATE INJURY.

ATTORNMENT CLAUSE *in a Mortgage—Distress.*] *A. B.* assigned the lease for twenty-one years of a house in which he resided, together with two policies of assurance upon his life, to the Defendant, by way of mortgage, to secure the repayment of £250 and interest, as well as the premiums upon the policies; and the mortgage deed contained a clause by which the mortgagor attorned tenant from year to year to the mortgagee in respect of the leasehold house at the yearly rent of £175, provided that the mortgagee might at any time, without notice, take possession of the premises and determine the tenancy. There was no specific provision that any part of such rent should be applicable to the principal of the debt. The mortgagor became bankrupt, and the mortgagee distrained upon the furniture in the house, which was not the property of *A. B.*, for a year's rent under the attornment clause, though at that time the landlord's rent of £115, the interest upon the money advanced, and the premiums upon the policies, had been paid.

The Plaintiff, who was the owner of the furniture, filed a bill to restrain the sale:—

Held, upon a demurrer for want of equity, that the attornment clause was not intended to enable the mortgagee to repay himself any of the capital advanced, but only to secure the payment of rent, interest, and premiums. Demurrer overruled.

Pinkhorn v. *Souster* (8 Ex. 763), and *Jolly* v. *Arbuthnot* (4 De G. & J. 224), distinguished.

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See SCOTCH EXECUTOR.

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See MISTAKE OF ARBITRATOR.

BANKER'S CHEQUE—*Donatio Mortis Causâ—Cheque not presented in Donor's Lifetime.*] The delivery of the donor's cheque on his banker, which was not presented before the donor's death :—
Held, not a good *donatio mortis causâ*.
HEWITT *v.* KAYE 198

2. ———— *Gift inter vivos—Refusal of Bankers to pay Cheque—Death of Donor.*] A cheque was given by *A.* to *B.*, and presented without delay. The bankers had sufficient assets of *A.*, but refused payment because they doubted the signature. The next day *A.* died, the cheque not having been paid :—
Held, a complete gift, *inter vivos*, of the amount of the cheque.
BROMLEY *v.* BRUNTON 275

BANKRUPTCY—Creditors' Deed—Jurisdiction 635
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See ALTERATIONS IN TESTATOR'S INTEREST.

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———— Bills taken up under protest 344
See BILLS TAKEN UP SUPRA PROTEST.

BILL QUIA TIMET—*Principal and Surety—Indemnity—Demurrer overruled.*] A surety on a bond to secure a money debt, was secured by another bond of indemnity entered into by the principal debtor's father, who had died, having by will devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no funds in hand, and that they were unable under the will to raise the money by sale of any portion of the testator's estate, except under a decree of the Court :—
Held that the surety, though he had not actually paid anything, was entitled to maintain a bill against the executors for administration, payment of the debt, and indemnity :
Held, further, that it was not necessary that the bill should be filed on behalf of all the creditors.
WOOLDRIDGE *v.* NORRIS 410

BILLS TAKEN UP SUPRA PROTEST—*Right to sue the Acceptor—Accommodation Bills.*] The indorsee or transferee for value of a bill of exchange after dishonour has a right to recover against the acceptor, whether the bill was given for value or not, unless there be an equity attached to the bill itself, amounting to a discharge of it; and the right of set-off is not an equity which attaches to the bill.
A person who takes up a bill *supra protest* for the benefit of a particular party to the bill succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon the bill, except that he discharges all the parties subsequent to the one for whose honour he takes it up, and that he cannot himself indorse it over.
In re OVEREND, GURNEY, & Co. *Ex parte* SWAN 344

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BLENDING OF REAL AND PERSONAL ESTATE—*Will—Real and Personal Estate blended.*] Testator gave his real and personal estate to his son *D.* (an imbecile) and to *D.'s* mother, "she to hold all in trust for him, with power to appropriate such sums as may not be necessary for her own proper support and his, to her other son and daughter *J.* and *A.*, but so that they are employed for their support and maintenance, and not to be risked in any way that would involve the destruction of the capital. And I direct that whatever may be preserved till the decease of my wife be so placed in trust as that my afflicted child (*D.*) may always be provided for, and my son *J.* and my daughter *A.*, both of which I appoint trustees to this my will, together with my wife, that they may have a voice in such arrangements as may be needful, but in case of bankruptcy or insolvency, they to have no power over the property beyond its legal vestment for conveyance, &c., but to depend on their mother during her life to do for them what may be proper, and after her decease to receive its income, and after their decease their heirs."

Testator survived his wife.

Held, that (subject to making a due provision for *D.*) *J.* and *A.* were jointly entitled to the real estate in fee, and to the personal estate for life (the Court declining to decide who would be entitled to the personal estate after the death of *J.* and *A.*)

Dunk v. *Fenner* (2 Russ. & My. 557) disapproved.

HERRICK *v.* FRANKLIN 593

BOND, Voluntary—*Post-obit* bond 468

See VOLUNTARY BOND.

BREACH OF CONTRACT — Proof under winding-up — Measure of damages 396

See UNLIQUIDATED DAMAGES.

BREAKING UP STREETS TO LAY GAS-PIPES—*Nuisance—Injunction—Act of Parliament—Construction—Statutory Powers extended by Implication—Practice —Motion for Decree—Amendment at Hearing.*] The breaking up of the streets of a town for the purpose of laying gas-pipes without lawful authority, is a nuisance so serious and important, that a Court of Equity will interfere by injunction to prevent it.

Attorney-General v. *Sheffield Gas Consumers Company* (3 D. M. & G. 304) not followed.

A local Act of Parliament, passed in 1788, vested the property of all the streets of a town in Commissioners, and empowered the Commissioners from time to time to cause the pavements to be taken up up and the streets to be paved, relaid, or altered, and to cause the streets to be lighted, and to contract with any persons for lighting the streets, and gave to the persons to be appointed by them for these purposes full power to do the same:—

Held, that although for the purpose of lighting the streets in the only methods then known, it was not necessary to break up the streets, the Act enabled the Commissioners to adopt every improved method of lighting, and consequently to break up, and authorize other persons to break up, the streets for the purpose of lighting them with gas.

Where a company having no statutory powers, but acting under the authority of Commissioners, commenced breaking up the streets of a town for the purpose of laying gas-pipes, and an information and bill was filed to restrain them, and afterwards the Commissioners revoked their authority, and the suit was brought to a hearing upon motion for decree upon an affidavit of such revocation, but without amendment of the information and bill, the Court being of opinion

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that the Defendants had acted lawfully so long as they had the authority of the Commissioners, but no longer, refused the motion for decree, but gave leave to amend the information and bill, so as to put in issue the revocation of the authority and the subsequent acts of the Defendants; and ordered the Plaintiffs to pay the Defendants' costs up to the time when the authority was revoked, reserving the subsequent costs.

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Herefordshire Banking Company, In re (Law Rep. 4 Eq. 250) observed on 368
See INTEREST ON DEBTS.

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Jolly v. *Arbuthnot* (4 De G. & J. 224) observed on 575
See ATTORNMENT CLAUSE IN A MORTGAGE.

Joyce v. *De Moleyns* (2 J. & Lat. 374) observed on 135
See DEPOSIT OF DEEDS.

Lake v. *Peisley* (1 Eq. 173) overruled 522
See EVIDENCE, ORDER TO READ.

Lloyd v. *Lloyd* (Law Rep. 2 Eq. 722) observed on 482
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See REVOCATION.

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Woolstencroft v. *Woolstencroft* (2 D. F. & J. 347) followed 1
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CHILDREN—Illegitimate children 278, 599
See ILLEGITIMATE CHILDREN. 1, 2.

CHILDREN OF WOMAN PAST CHILDBEARING, *Gift to—Remoteness.*] Gift to a married woman for life, with remainder to her children for life, and a gift over to the grandchildren:—

Held, that evidence that at the date of the will the married woman was past the age of childbearing was not admissible for the purpose of shewing that children then living were meant, so as to make valid the gift over, which otherwise was void for remoteness.

In re SAYER'S TRUSTS 319

CHILDREN WHO SHALL ATTAIN TWENTY-ONE, *Gift to—Will—Vesting—Power of Advancement out of vested or presumptive Shares.*] Where a gift to all the children of *A.* "now or hereafter to be born who shall attain the age of twenty-one years," was followed by a power of advancement out of the vested or presumptive share of any object of the gift:—

Held, that the class of children to take was not ascertained when the eldest child attained twenty-one.

Bateman v. *Gray* (29 Beav. 447) reversed.

BATEMAN *v.* GRAY 215

CHURCH BUILDING ACTS—Legacy for building parsonage 69
See ATTESTING WITNESS.

CITY IMPROVEMENT ACT, 1847 (10 & 11 *Vict. c. cclxxx.*)—*Compensation—Separate Interests, Separate Assessment of.*] Upon the construction of sects. 20 and 21 of the *City Improvement Act*, 1847, where separate interests are claimed in the same property it is the

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right of every person making a separate claim to have a separate assessment by a separate jury of the amount of compensation payable to him. Hence the corporation of *London* were restrained by injunction from exceeding their statutory powers by proceeding to trial upon a precept by the terms of which the compensation payable to the under-lessee and the various persons claiming under him in respect of their several interests in a house required to be taken by the corporation under the *Holborn Valley Improvement Act*, 1864 (with which the *City Improvement Act*, 1847, is incorporated) would have to be assessed by one jury and in one trial.

ABRAHAMS *v.* MAYOR, ALDERMEN, AND COMMONS OF THE CITY OF LONDON 625

CLERK OF THE PATENTS—*Information — Crown Accountant — Jurisdiction of the Court—Clerk to the Commissioners of Patents —Discounts on Stamps—Statute* 3 *&* 4 *Will.* 4, *c.* 84—"*Expenses incident to the performance*" *of the Duties of the Office—Fees and Emoluments—Cost of purchasing and engrossing Parchments for Patents.*] By the 3 & 4 Will. 4, c. 84, it was enacted that from and after the 20th of August, 1833, there should be paid to the Clerk of the Patents the yearly salary of £400; and that the said salary should be taken in full satisfaction for the duties of the office, and of all expenses incident to the performance thereof; also that it should be lawful for the Clerk of the Patents to receive all the fees and emoluments which had been accustomed to be paid, and which of right ought to be paid to the said officer in respect of the said office, and that such fees and emoluments should be accounted for once in every three months, and should be paid by the said officer into the Exchequer.

The Defendant was, in 1833, appointed Clerk of the Patents under the above Act, and in 1852 was continued in his office as Clerk of the Commissioners of Patents:—

Held, that the position and liability of the Defendant, under the above statute, were those of a paid agent for the purpose of receiving and paying over money; and that, in the absence of any enactment expressly excluding the jurisdiction, the Crown was entitled in this Court to file an information against the Defendant for an account of the public moneys received by him.

It having been the practice in the Inland Revenue Department for the purchasers of stamps to be allowed a reduction on payment in cash, the Clerk of the Patents had been accustomed to purchase stamps in the Revenue Office for the accommodation of the patentees, he paying the reduced amount for the stamps, and afterwards receiving the amount in full from the patentees:—

Held, that he was liable to account for any profit that might have been made on the purchase of stamps purchased with public moneys, but not for any profit made on the purchase of stamps purchased with his own money.

Previously to August, 1833, a customary fee of £6 8*s.* 4*d.* was paid by every patentee upon the issue to him of a patent for an invention, and on payment of such fee he received the patent engrossed on parchment, without being charged with any specific sum for the cost of the parchment or of engrossing and preparing the patent:—

Held, that the Clerk of the Patents, in accounting for the fees received by him from patentees, was not entitled, after the passing of the Act, to make any deduction in respect of the cost of the parchment, or of the preparation and engrossment of the patent, from the fee paid to him by the patentee.

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CO-OWNERSHIP OF REAL ESTATE—*Investment of Profits in Land—Partnership—Real or Personal Estate.*] Certain hereditaments, being partly agricultural land and partly a quarry, were vested in several co-owners in undivided shares. The quarry was worked, and the agricultural land let, and the rents thereof received by one of the co-owners on behalf of the rest; and the yearly rents and profits, after payment of outgoings and expenses, were in general divided among the owners in proportion to their shares. In some years, however, the

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profits were laid out in the purchase of lands in the same locality, and these were partly agricultural lands and partly used in connection with the quarry. The purchased lands were conveyed to the managing owner for the time being, and managed by him in the same way as the lands originally belonging to him and the other co-owners :—

Held, that the share of one of the co-owners, who died intestate, in the purchased lands descended to her heir-at-law, and did not pass to her legal personal representative.

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See WINDING-UP PETITION. 1, 2.

COUNTY COURT JURISDICTION—*Foreclosure Suit—Costs.*] In a suit to foreclose a mortgage for £40, where both Plaintiff and Defendant lived at the same place :—

Held, that the Plaintiff was entitled only to such costs as he would have obtained in the County Court.

SIMONS *v.* MCADAM 324

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COVENANT TO SETTLE—*Future Property of Wife—Legacy to Separate Use.*] In a marriage settlement it was declared, and the husband covenanted, that in case at any time during the coverture any real, personal, or mixed estate of the value of £500 should come to or vest in the wife, or the husband in her right, at law or in equity, by devise, descent, gift, or otherwise, it should be conveyed and assigned from time to time without delay by the husband, his executors and administrators, and the wife upon the trusts of the settlement:—

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Held, that a legacy given to the separate use of the wife was within the covenant.

CAMPBELL *v.* BAINBRIDGE 269

2. COVENANT TO SETTLE—*All other Property of Wife—Defeasible Interest—Estate Tail in Remainder after other Estates Tail—Fines and Recoveries Act.*] A covenant in a marriage settlement by husband and wife to settle all the estate, property, and effects whatever which they or either of them in the right of the wife were or was at the date of the settlement, or should during the coverture become, seised or possessed of or entitled to at law or in equity, for all the estate and interest of them or either of them upon the trusts of the settlement:—

Held, only to include indefeasibly vested interests, and therefore not to include the wife's interest in real estate which, at the date of the settlement, stood limited to *A.*, the wife's father, for life, with remainder to his sons successively in tail male, with remainder to *B.* for life, with remainder to his sons successively in tail male, with remainder to the daughters of *A.* as tenants in common in tail, *A.*, *B.*, and two sons of *A.*, having been alive at the date of the settlement, the two sons having died bachelors during the coverture, and *A.* and *B.* having survived the husband, and died without issue in the wife's lifetime:

Whether under the covenant the wife could have been compelled to execute a disentailing deed, if during the coverture she had acquired an indefeasibly vested estate tail—*quære.*

DERING *v.* KYNASTON 210

CREDITORS' DEED—*Administration of Trusts—Jurisdiction—Bankruptcy Act*, 1861, *ss.* 192–200.] The administration of the trusts of a creditors' deed, which has been assented to and registered, so as to render it valid and binding under the provisions of the *Bankruptcy Act*, 1861, s. 192, belongs exclusively to the Court of Bankruptcy.

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CREDITORS' SUIT—Evidence in Chambers of Plaintiff's debt 464

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CROWN ACCOUNTANT—Information against 381

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CUSTOM OF STOCK EXCHANGE—*Sale of Shares—Specific Performance—Brokers and Jobbers—Winding-up before Transfer.*] On the 9th of May the Plaintiff, through his brokers, sold 200 shares in *O. G. & Co.* to the Defendants, who were stock-jobbers, the settling-day being the 15th of May. On the 10th the company stopped payment, and the Petition for winding up was presented on the 11th of May. The purchase-money was paid by the Defendants on the 15th, and the certificates of the shares were then delivered by the Plaintiff, and transfers were executed by him to seventeen persons as nominees of the Defendants. The transfers could not be registered in consequence of the winding up of the company:—

Held, upon bill for specific performance, that the Defendants were bound to fulfil the contract, to repay the amount of calls paid by the Plaintiff, and to indemnify him against future calls.

COLES *v.* BRISTOWE 149

2. ———————— *Sale of Shares — Indemnity — Voluntary Winding-up under Supervision — Commencement of Winding-up—Companies Act*, 1862, *ss.* 84, 130, 148, 151.] *A.* bought of

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a jobber on the *Stock Exchange* shares in a company, and afterwards, the company having in the meantime stopped payment, *B.* sold to another jobber on the *Stock Exchange* shares in the same company at a lower price for the same settling-day. On the name-day *A.'s* name was given to *B.* as the purchaser of *B.'s* shares; *B.* executed a transfer of the shares to *A.*, and delivered the transfer and certificates to *A.'s* broker, who paid him the price for which *A.* purchased the shares; *A.* afterwards repaid his own broker, and took away the transfer and certificates, but did not execute the transfer, and it was never registered:—

Held, that *A.* was liable to indemnify *B.* against all consequences flowing from the ownership of the shares subsequent to the execution of the transfer, and that this liability arose from the nature of *A.'s* original contract, according to the custom of the *Stock Exchange*, by which the buyer or seller of shares undertakes to buy or sell from or to the person whose name is given to him on the name-day.

Semble, when a voluntary winding-up is ordered to be continued subject to supervision, the winding-up is to be deemed to commence from the date of the resolution authorizing the winding-up, and not of the presentation of the Petition on which the order is made.

HODGKINSON *v.* KELLY 496

3. CUSTOM OF STOCK EXCHANGE—*Sale of Shares—Privity—Transfer in blank—Indemnity—Payment of Calls.*] The Plaintiff, a holder of forty shares in a public company, sold that number on the *Stock Exchange*, through his broker, to a jobber for £202 10*s.* The Defendant subsequently bought on the *Stock Exchange*, through a broker, 100 shares, and, in accordance with the usage, the name of the Defendant was given to the Plaintiff's broker as the purchaser of his forty shares. The Plaintiff executed and gave to his brokers a deed transferring the shares to the Defendant, the consideration being left blank. The brokers filled up the consideration with £145, which, with the sums paid by the Defendant for the other sixty shares, made up the price he had agreed to pay. This £145 was paid by the Defendant, who thereupon received the transfer and certificates of the shares. The Defendant never executed the transfer; but he kept it and the certificates in his possession and never repudiated the transaction. An order was made for winding up the company, and the Plaintiff was compelled to pay two calls, which carried interest at 11 per cent.:—

Held, that there was a contract between the Plaintiff and the Defendant, entitling the former to be indemnified by the latter in respect of the calls: but that, as the Plaintiff knew that the Defendant resisted his demand, he ought to have paid the calls at once, and could only recover interest on the calls at 4 per cent. from the days on which they became due.

HAWKINS *v.* MALTBY 505

4. ——————————— *Sale of Shares—Specific Performance—Guarantee of Registration—Executor with deficient Estate, Extent of Indemnity to.*] Plaintiff, on the 2nd of November, 1865, through his brokers, sold 100 shares to the Defendants, who were stock-jobbers. The sale-note expressed that the sale was by order of the Plaintiff; that it was "subject to the rules of the *London Stock Exchange*;" and "with registration guaranteed:" also that payment was to be on the 15th of November following. Shortly before this date the Defendants sent to the Plaintiff's brokers the name of *H.* as transferee, with the purchase-money; and the transfers were executed by the Plaintiff to *H.*, and handed to his brokers. The transfers not having been registered, the Defendants, in December, 1866, obtained a decree for specific performance by *H.* of the contract with them, and

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for indemnity. Meanwhile the company had been wound up, and the Plaintiff's name being still on the register, was settled on the list of contributories. He then filed this bill against the Defendants for specific performance, and indemnity:—

Held, that stock-jobbers are principals, and personally liable upon the contracts into which they enter:

Held further, that the above facts did not disclose a novation of, or substitution of another contract for, the original contract; and that the Plaintiff was entitled to a decree for specific performance and indemnity.

The Plaintiff having died, his executor, having been placed on the list of contributories, revived the suit. The estate was insufficient:—

Held, that the right to indemnity was not limited to the amount of dividend which the estate would be sufficient to pay; but that the executor was entitled to all the rights to which his testator, if living, would have been entitled.

CRUSE *v.* PAINE 641

CUSTOM OF STOCK EXCHANGE — Mortgage of stock — Replacing identical stock 165

See STOCK MORTGAGE.

CY-PRÈS—Charity for Presbyterian dissenters 563

See PRESBYTERIAN DISSENTERS.

DAMAGES—Measure of—Proof under winding-up—Breach of contract—Unliquidated damages 396

See UNLIQUIDATED DAMAGES.

DEATH BEFORE "RECEIVED"—*Will — Period of Vesting — "Received," read "receivable."*] A testator gave the residue of his property to trustees to invest and pay the interest, or so much as they should think fit, to his wife until his daughter should attain twenty-one, for the support of herself, and the maintenance and education of his son and daughter; and when his daughter should attain twenty-one, then to divide the property between his two children, and in case of the death of either of them without issue before their estates or interests should be received, then to pay the interest of the one so dying to the survivor, but in case either should die previous to the time aforesaid leaving issue, then the issue were to take the parent's share, and in case both died previous to the time aforesaid without issue, then he gave the property over. By a codicil the testator declared that the payments directed to be made by his will for the benefit of his wife during the minority of his daughter should be continued during the life of his wife, although she might live beyond that period, and noticing the death of his son he gave the son's portion to the daughter in the same manner as her own share. The daughter attained twenty-one, and died, leaving issue, before the testator's wife:—

Held, that the daughter's interest was vested at twenty-one, though her right to receive the property was intercepted until the death of the wife.

WEST *v.* MILLER 59

DEBENTURE, *Form of—Assignment of all Real and Personal Estate of Company.*] A debenture purporting to be an assignment of the undertaking, and all the real and personal estate of the company, to secure the repayment of a sum of money at a future date:—

Held, to create a valid charge on all personal estate of the company existing at the date of the debenture, but not on subsequently-acquired personal estate.

In re NEW CLYDACH SHEET AND BAR IRON COMPANY 514

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DEBENTURE, form of—No date for repayment of principal 437
See DEBENTURE HOLDER.

———— Issue of, to pay creditors 82
See POWER OF BORROWING.

DEBENTURE HOLDER—*Right to recover Principal—Receiver—Canal Company.*] By a canal company's Act the proprietors were empowered to borrow on the credit of the undertaking, and to assign the property and rates as a security for the sum borrowed, in a form which fixed no date for the repayment of the principal. It was declared that there should be no priority by reason of date or otherwise amongst the debenture holders; and that every holder of a debenture might transfer the same according to a form specified. It was further provided, that the interest due on the moneys so borrowed should be paid in preference to any dividend to shareholders. By a subsequent Act further borrowing powers were given to the company, and it was provided that all persons to whom mortgages should be made under that Act should be entitled to the company's rates and property in proportion to the "interest" of the sums for which such mortgages should be executed:—

Held, that the holder of a debenture of the specified form was entitled, upon non-payment by the company, after six months' notice, of the principal money secured by the debenture, to a receiver; although there was not, and never had been, any arrear of interest; and although some of the debenture holders refused, and others might not be able, to consent to be paid off.

HOPKINS *v.* WORCESTER AND BIRMINGHAM CANAL PROPRIETORS 437

DEEDS—Deposit of title deeds 135
See DEPOSIT OF DEEDS.

DEFEASIBLE INTEREST—Covenant to settle all other property of wife 210
See COVENANT TO SETTLE. 2.

DEMURRER—Bill *quia timet* 410
See BILL QUIA TIMET.

———— Suit to restrain intimidation of workmen 551
See INTIMIDATION OF WORKMEN.

DEPOSIT OF DEEDS—*Right to Title Deeds—Equitable Mortgage by Trustee without Notice—Priority—Delivering up of Deed as against a bonâ fide Purchaser without Notice.*] A trustee of funds, invested on a mortgage in his name, deposited the deeds, without notice of the trust, to secure an advance to himself:—

Held, that the *cestuis que trust* were entitled to priority over the equitable mortgagee, and to delivery up of the deeds.

Joyce v. *De Moleyns* (2 J. & Lat. 374) commented on.

NEWTON *v.* NEWTON 135

DEROGATING FROM GRANT—Light and air—Garden 311
See LIGHT AND AIR.

DESIGNATIO PERSONÆ—Bequest to illegitimate children by name .. 599
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DIRECTION TO PAY DEBTS—Covenant to pay annuity—Double portions 7
See PORTIONS, DOUBLE.

———— General power of appointment .. 193
See APPOINTMENT BY DIRECTION TO PAY DEBTS.

DIRECTORS—Liability of, after functions of company have ceased .. 143
See PREFERENCE SHAREHOLDER.

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DIRECTORS—Liability of, for misconduct 112
See OFFICIAL LIQUIDATOR, SUIT BY.

———— Power of, to refuse to register transfer 238
See TRANSFER OF SHARES.

DISCLAIMER—*Costs—Foreclosure Suit—Equitable Mortgage agreed to be transferred before Suit.*] A first mortgagee having notice that *A.*, a second mortgagee, had agreed, for valuable consideration, to transfer his mortgage to *B.*, but had not executed a transfer, made *A.* a Defendant to a foreclosure suit. Before appearing, and again immediately after appearing, *A.* told the Plaintiff that he had no interest in the property, and offered to disclaim, and, being served with interrogatories, he put in an answer and disclaimer. Afterwards he executed a transfer of his mortgage to *B.*, and the Plaintiff then offered to dismiss the bill against him without costs:—
Held, that *A.*, until he executed the transfer, was a necessary party, and that he was not entitled to his costs.
ROBERTS *v.* HUGHES 20

DISCRETION OF COURT—Winding-up Petition—Order for Petition to stand over 339
See WINDING-UP PETITION. 3.

DISCRETION OF DIRECTORS—Refusal to register transfer 238
See TRANSFER OF SHARES.

DISSENTERS' CHAPELS ACT (7 & 8 Vict. c. 45)—Presbyterians—Baptists 563
See PRESBYTERIAN DISSENTERS.

DISTRESS, power of—Rent-charge—Railway—Lands Clauses Act, s. 11 14, 488
.. *See* LANDS CLAUSES ACT. 1, 2.

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See SOLICITOR'S LIEN.

DOMICIL—Debt in foreign country—Administration in *England* .. 485
See LEX LOCI CONTRACTUS.

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DOUBLE PORTIONS—Covenant to pay annuity—Gift of annuity .. 7
See PORTIONS, DOUBLE.

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———— Light and air—Garden 311
See LIGHT AND AIR.

EQUITABLE MORTGAGE by trustee—Priority—Deposit of deeds .. 135
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ESTOPPEL—Mistake in recitals—Executor 25
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EVIDENCE—Arbitration—Explanation by arbitrator 429
See MISTAKE OF ARBITRATOR.

———— Examiners out of jurisdiction—Form of appointment of .. 467
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———— Further evidence—Inquiry at the hearing 23
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———— to explain will 319
See CHILDREN OF WOMAN PAST CHILDBEARING.

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EVIDENCE IN CREDITORS' SUIT—*Practice—Plaintiff's Debt disputed in Chambers—Release—Right of Defendant to tender further Evidence.*] After a decree in a suit by a Plaintiff on behalf of himself and all other creditors, the executor may go into fresh evidence in Chambers for the purpose of establishing a case of release, although the allegations in the bill contain statements upon which the defence of release might have been sufficiently raised at the hearing.
CARDELL *v.* HAWKE 464

EVIDENCE, ORDER TO READ—*Practice—Consolidated Order XIX. Rule 4—Depositions in Bankruptcy.*] An order will not be made under Consolidated Order XIX., r. 4, to read depositions in bankruptcy at the hearing.
Lake v. *Peisley* (Law Rep. 1 Eq. 173) overruled.
ALLEN *v.* BONNETT 522

EXAMINERS OUT OF JURISDICTION—*Form of Order appointing.*] Form of order appointing examiners to act out of the jurisdiction, discussed.
LONDON BANK OF MEXICO AND SOUTH AMERICA *v.* HART .. 467

EXECUTION—Leave to issue—Scheme of arrangement under Railway Companies Act, 1867 610
See SCHEME OF ARRANGEMENT. 3.

EXECUTOR—Indemnity in respect to payment of calls 641
See CUSTOM OF STOCK EXCHANGE. 4.

———— of general power—Direction to pay debts 193
See APPOINTMENT BY DIRECTION TO PAY DEBTS

———— Scotch executor—Leaseholds in *England* 218
See SCOTCH EXECUTOR.

EXECUTOR OF EXECUTOR—Renunciation 25
See RECITALS.

EXECUTORY TRUST—*Will—Construction—Heir-looms—Executory Trust.*] Jewels were bequeathed to testatrix's nephew, *A.*, "to go and be held as heir-looms by him and by his eldest son on his decease, and to go and descend to the eldest son of such eldest son, and so on to the eldest son of his descendants, as far as the rules of law or equity will permit. And I request my said nephew to do all in his power, by his will or otherwise, to give effect to this my wish as to these things so directed to go as heir-looms as aforesaid:"—
Held, that a valid executory trust was created for *A.* for life, with remainder to *B.* (*A.*'s eldest son) for his life, and upon the death of *B.* in trust for *B.*'s eldest son, to be a vested interest in him when he should attain twenty-one; but if he should die in *B.*'s lifetime, or after *B.*'s death, without having attained twenty-one, leaving an eldest son born before *B.*'s death, in trust for such last-mentioned eldest son, to be a vested interest when he should attain twenty-one. Subject to these limitations, the jewels vested in *A.* absolutely, and passed by his will.
The objection, if any, to limiting personal estate as heir-looms, where there is no real estate to guide the limitations, does not apply to the case of family jewels.
SHELLEY *v.* SHELLEY 540

EXONERATION of mortgaged estate—Locke King's Act—Direction to pay debts 1
See LOCKE KING'S ACT.

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EXONERATION of personal estate from debts and costs 534
See MARSHALLING.

FAMILY JEWELS limited as heir-looms—Real estate 540
See EXECUTORY TRUST.

FINES AND RECOVERIES ACT—Married woman's estate tail in remainder 210
See COVENANT TO SETTLE. 2.

FOREIGN COMPANY — *Winding-up — Jurisdiction.*] A joint stock company formed in *India*, and incorporated by registration under Indian law, and having its principal place of business in *India*, with an agent and a branch office in *England*, may be wound up under the *Companies Act*, 1862.
In re COMMERCIAL BANK OF INDIA 517

FOREIGN LAW—*Lex loci contractus* 485
See LEX LOCI CONTRACTUS.

FORFEITURE CLAUSE—*Will—Conditional Legacy—Condition Precedent—Bankruptcy—Annulment.*] A legacy was given to *A.* "if not an uncertificated bankrupt at the testator's death." *A.* was a bankrupt at the testator's death, but his bankruptcy was annulled four months afterwards:—
Held, that *A.* was not entitled to the legacy.
White v. *Chitty* (Law Rep. 1 Eq. 372), and *Lloyd* v. *Lloyd* (Law Rep. 2 Eq. 722), distinguished.
COX *v.* FONBLANQUE 482

FORFEITURE OF SHARES—*Collusive Forfeiture — Contributory—Fraud—Register of Shareholders—Costs.*] Fifty shares in a company were registered in the joint names of a father and son on their application, and they paid £150 by way of deposit and allotment money. Shortly afterwards a call of £2 a share was made. The father became a director, and having, as he said, discovered that the company was formed under circumstances of gross fraud, wrote to the chairman, warning the directors against involving the shareholders in any fresh liability. Shortly after he resigned his seat as director. Two months afterwards (the call being unpaid) the father wrote to the chairman, requesting the directors to declare the shares forfeited; and said that he and his son must be satisfied that their names were taken off the register. A resolution was thereupon passed that the shares be forfeited; but the names were not removed from the register of shareholders, and were on it when the winding-up order was made more than a year afterwards. No steps were taken on one side to enforce the call, or on the other to recover the deposit and allotment money.
Upon summons by the official liquidator, that the names might be settled on the list of contributories:—
Held, that the so-called forfeiture of shares was void; and that the Respondents must be settled on the list of contributories.
The costs of a contest by a person disputing his liability to be a contributory, and failing, must, except under special circumstances, be paid by such contributory.
In re LONDON AND PROVINCIAL STARCH COMPANY. GOWER'S CASE 77

——————— before voluntary winding-up 232
See VOLUNTARY WINDING-UP.

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"FORTHWITH"—*Practice—Cons. Ord. XXIII. Rule* 10—*Order to do an Act "forthwith."*] An order of the Court for the delivering up of a deed "forthwith" is a sufficient expression of time within the meaning of Cons. Ord. XXIII. rule 10.
THOMAS *v.* NOKES 521

FRAUD—Collusive forfeiture of shares 77
See FORFEITURE OF SHARES.

——— Undue influence—Spiritualism 655
See UNDUE INFLUENCE.

FRAUDS, STATUTE of—Auctioneer signing for the vendors 218
See SCOTCH EXECUTOR.

FRAUDULENT CONVEYANCE—Voluntary bondholder 468
See VOLUNTARY BOND.

FRAUDULENT PREFERENCE—Company—Issue of debentures to pay creditors 82
See POWER OF BORROWING.

FUTURE PROPERTY—Covenant to settle 210, 269
See COVENANT TO SETTLE. 1, 2.

GARDEN—Light and air—Derogating from grant of easement 311
See LIGHT AND AIR.

GAS COMPANY—Injunction against breaking up streets 282
See BREAKING UP STREETS TO LAY GAS-PIPES.

GENERAL DEVISE OF REAL ESTATE *passing Mortgaged Estate—Gift of Legacies followed by general Devise of Realty—Legal Estate in Mortgage held to pass.*] A testatrix directed her just debts to be paid. She then gave pecuniary legacies, and gave all the rest, residue, and remainder of her real and personal estate and effects to *J. T.*, for her own absolute use and benefit:—
Held, that although by these dispositions the testatrix's own real estate was charged with debts and legacies, an estate of which she was mortgagee was not excepted from the residuary devise.
In re STEVENS' WILL 597

GENERAL POWER of appointment—Appointment by direction to pay debts 193
See APPOINTMENT BY DIRECTION TO PAY DEBTS.

GENERAL WORDS—"Ways heretofore enjoyed"—Vendor and purchaser 36
See "WAYS HERETOFORE ENJOYED."

GIFT INTER VIVOS—Banker's cheque—Refusal of bank to pay cheque—Death of donor 275
See BANKER'S CHEQUE. 2.

GUARANTEE OF REGISTRATION 641
See CUSTOM OF STOCK EXCHANGE. 4.

HEIR-LOOMS—Direction to son to give effect to gift of heir-looms—Heir-looms where no real estate 540
See EXECUTORY TRUST.

HONOUR OF DRAWER—Bill of exchange—Right to sue acceptor .. 344
See BILLS TAKEN UP SUPRA PROTEST.

HOUSE, part of—Lands Clauses Act, s. 92—Curtilage 101
See LANDS CLAUSES ACT. 5.

HUSBAND AND WIFE—Covenant to settle future and other property 210, 269
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HUSBAND AND WIFE—Specific performance against wife 606
See MARRIED WOMAN.

ILLEGAL APPLICATION of funds—Company—Promotion of suit not instituted by company 228
See SUIT NOT INSTITUTED BY COMPANY.

ILLEGITIMATE CHILDREN—*Bequest by a Spinster to her Children.*] A testatrix, who was never married, describing herself as a spinster, bequeathed her property in trust for her children. She had four illegitimate children at the date of the will, three of whom and an after-born child were living at her death, and in a codicil she described her children by name:—

Held, that the children, and not the next of kin of the testatrix, were entitled to her property.

CLIFTON *v.* GOODBUN 278

2. ——————— *Designatio Personæ.*] Testator, by his will, after a gift to his son *T.* (who was illegitimate), directed the division of his estate into seven parts, one of which was given to his widow, and after her death to "such of his children to whom the other six shares were given." As to those six shares, the direction was to pay them "among all my children living at my decease, except my son *T.*"

Testator left seven children of whom five were legitimate, two (*T.* and *A.*) illegitimate:—

Held, that *A.* was not entitled to a share as one of testator's children.

In re WELLS' ESTATE 599

INCOME AND CAPITAL—Trust fund and arrears of interest 12
See APPROPRIATION OF PAYMENT.

INCOME TAX ON INTEREST—*Assignment for Creditors.*] Where a fund was assigned to trustees upon trust to pay a fixed sum annually to creditors *pro ratâ*, with interest till payment:—

Held, that the assignor was entitled to deduct income tax on the payments in respect of interest.

CRANE *v.* KILPIN 334

INDEFINITE TRUST—*Will—Charity—Legacy—Failure of Bequest.*] Testator bequeathed as follows:—"I give to the trustees of *Mount Zion Chapel*, where I attend, £3500, and appoint as trustees to the same *A.* and *G.*; and I direct that their receipt shall be a sufficient discharge to my executors; and the money to be appropriated according to statement appended." There was no statement appended:—

Held, that the gift was not intended to be for *A.* and *G.* beneficially; that the Court could not presume a charitable object in the bequest; and if not charitable, that the object was so indefinite that the gift must fail.

ASTON *v.* WOOD 419

INDEMNITY—Surety—Bill *quia timet* 410
See BILL QUIA TIMET.

——————— Payment of calls 149, 496, 505, 641
See CUSTOM OF STOCK EXCHANGE. 1, 2, 3, 4.

INDIAN COMPANY 517
See FOREIGN COMPANY.

INFANT SHAREHOLDER 455, 512
See INFANT TRANSFEREE. 1, 2.

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INFANT TRANSFEREE — *Company — Winding-up — Contributory.*] Where the liquidators of a company seek to place on the list of contributories a person as the holder of shares, and he objects on the ground of his having transferred the shares, it is incumbent on him to shew that at some time or other there was on the register a transferee of his who could be made liable at law in respect of the shares.

Hence, where ten shares were standing on the register of a company in the name of an infant—upon the company being wound up, the Court, on the application of the liquidators, removed the name of the infant from the register in respect of the shares, and substituted that of the transferor; although the ten shares originally formed part of a batch of eighty shares which had been purchased on behalf of the infant, all of which eighty shares had, prior to the winding-up, been sold by the infant, the purchase-money received, and the transfers executed by all the purchasers, and the transferees of all (except the ten shares in question), entered on the register of shareholders.

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION. CURTIS'S CASE 455

2. ——————— *Contributory — Rectification of Register — Delay.*] An infant shareholder in a company attained her majority six months after the commencement of the winding up of the company, and was, after due notice, settled on the list of contributories. More than a year after the filing of the certificate of the settlement of the list, and nearly three years after she attained her majority, she applied to have her name removed from the list:—

Held, that she was not precluded by delay.

In re ALEXANDRA PARK COMPANY. HART'S CASE 512

INFORMATION—Crown accountant—Account of public money 381
See CLERK OF THE PATENTS.

——————— Public convenience—Diversion of road by railway company 106
See PUBLIC CONVENIENCE.

INJUNCTION—Breaking up streets to lay gas-pipes 282
See BREAKING UP STREETS TO LAY GAS-PIPES.

——————— Company—Promotion of suit not instituted by company .. 228
See SUIT NOT INSTITUTED BY COMPANY.

——————— Copyright in periodical 415
See PERIODICAL, COPYRIGHT IN.

——————— Intimidation of workmen 551
See INTIMIDATION OF WORKMEN.

——————— Private injury from obstruction of public way 177
See PRIVATE INJURY.

——————— Public convenience—Diversion of road—*Ultrà vires* .. 106
See PUBLIC CONVENIENCE.

INJURY TO PROPERTY—Trades unions—Injunction 551
See INTIMIDATION OF WORKMEN.

INQUIRY AT THE HEARING—*Surprise — Notice — General Allegation—Evidence of Particular Fact.*] In a cause where replication is filed, if the question turns upon a particular matter of fact not specifically alleged in the pleadings, the Court will not give the Defendant leave to put in further evidence after the evidence is closed, but will at the hearing direct an inquiry as to such fact.

Where the Plaintiff's right to relief depended on the fact of the Defendant having had notice of a mortgage, and the bill alleged

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generally that the Defendant had express notice, and the answer generally denied notice, and the Plaintiff filed replication, and gave evidence that on a particular occasion a written notice of the mortgage was given with other documents to the Defendant's agent, a motion by the Defendant after the evidence was closed for leave to put in further evidence was refused, but at the hearing an inquiry was directed, on the ground of surprise, whether or not he had notice of the mortgage.

WESTON *v.* EMPIRE ASSURANCE CORPORATION 23

INSUFFICIENT FUND—Abatement—Appointment of part of fund .. 65
See ABATEMENT.

INTEREST—Arrears of, and trust fund—Appropriation of 12
See APPROPRIATION OF PAYMENT.

———— Debts under winding-up 368
See INTEREST ON DEBTS.

———— Income tax on creditors' deed 334
See INCOME TAX ON INTEREST.

INTEREST ON DEBTS—*Winding-up—Stoppage of a Bank—Demand for Payment—Companies Act*, 1862—*26th Rule of Order of November*, 1862.] Upon the winding up of a banking company all the debts were paid in full. The creditors on deposit accounts claimed interest at the rate of 4½ per cent., in pursuance of a resolution passed by the directors shortly before the stoppage of the bank, but not communicated to the depositors, increasing the rate of interest to that amount, and in pursuance of an intimation by the liquidators that the increased rate would be allowed:—

Held, that the resolution of the directors not having been communicated to the depositors, and the liquidators not having power to make the bank liable for any fixed amount of interest, the previous rate of interest, £4 per cent. only, would be allowed.

Interest was also claimed upon bank notes and drafts current at the time the bank stopped payment:—

Held, that closing the doors of the bank dispensed with the necessity of a formal demand for payment, and that interest was therefore payable:

Held, also, that the creditors were entitled to interest under the 26th rule of the Order of November, 1862, the Court being of opinion that the rule was still binding upon the Judges, and must be acted upon until abrogated. Interest was allowed at £4 per cent.

Observations on *Hatfield Cask Company* (2 N. R. 502; 9 Jur. (N.S.) 997; 11 W. R. 971), and *In re Herefordshire Banking Company* (Law Rep. 4 Eq. 250).

In re EAST OF ENGLAND BANKING COMPANY 363

INTERROGATORIES BY DEFENDANT—*Concise Statement*—15 & 16 *Vict. c.* 86, *s.* 19—*Leave to amend.*] The Court will give leave to amend a concise statement with interrogatories, after the answer to the interrogatories has been put in, where the Defendant states that the amendment is important for the purpose of making out his case.

CROSSLY *v.* DIXON 332

INTIMIDATION OF WORKMEN—*Trades Unions—Injury to Property—Injunction.*] The Defendants, who were officers of a trades union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the Plaintiffs pending a dispute between the union and the Plaintiffs. The bill prayed an injunction to restrain the issuing of the placards and advertisements,

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alleging that by means thereof the Defendants had, in fact, intimidated and prevented workmen from hiring themselves to the Plaintiffs, and that the Plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished :—

Held, upon demurrer, that the acts of the Defendants, as alleged by the bill, amounted to crime, and that the Court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property.

Demurrer overruled.

SPRINGHEAD SPINNING COMPANY *v.* RILEY 551

INVESTMENT of profits of partnership business in land 479

See CO-OWNERSHIP OF REAL ESTATE.

JOINT SOLICITORS WITH COMMON AGENT—Joint solicitors not in partnership may appear for a Plaintiff by a common agent.

WALDON *v.* THOMPSON 7

JUDGMENT CREDITOR—*Priorities gained by Date when Writ reaches Sheriff—Lien arises only after Return—Law of Judgments Amendment Act* (27 & 28 *Vict. c.* 112.] By the *Law of Judgments Amendment Act* (27 & 28 Vict. c. 112) a judgment creditor has no lien upon the land of his debtor until he has got a return from the sheriff, though he may, after putting the writ in the hands of the sheriff and before the return, have a right to file a bill to remove a legal impediment; and priorities of judgment creditors against lands are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff.

Therefore a judgment creditor subsequent in point of date, but who was the first to place his writ in the hands of the sheriff, and get the lands of the debtor extended under such writ, was held entitled in priority to a prior judgment creditor whose writ was subsequently placed in the sheriff's hands before the lands were extended.

GUEST *v.* COWBRIDGE RAILWAY COMPANY 619

JURISDICTION—County Court—Mortgage for £40—Foreclosure—Costs 324

See COUNTY COURT JURISDICTION.

———— Crown Accountant 381

See CLERK OF THE PATENTS.

———— Settled Estates Act—Sale of Mines 248

See SETTLED ESTATES ACT. 1.

———— Trustee Act—Appointing trustees where none before .. 580

See TRUSTEES APPOINTED WHERE NONE BEFORE.

LACHES OF CONTRIBUTORY—*Transfer of Shares—Laches of Company and Transferor—Companies Act*, 1862, *s.* 35.] Although there may have been unnecessary delay on the part of a company in registering a transfer of shares, no order for the rectification of the register can be made under the 35th section of the *Companies Act*, 1862, on the application of a transferor who is also in default, after the company has been ordered to be wound up.

A shareholder in a company resisted an action for calls on the ground of alleged misrepresentations contained in the prospectus; and also brought an action against the promoters and directors to recover moneys previously paid in respect of the shares. Both actions were, with the sanction of the company, compromised, one term of the compromise being that the shares should be transferred to one of the directors. A transfer was accordingly executed by the shareholder and the transferee, and deposited with the attorney who acted for the

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company and the directors in the actions; but no further steps were taken in the matter, and two years after the company was ordered to be wound up:—

Held, that the shareholder, whose name remained on the register, was a contributory.

Fox's Case (Law Rep. 5 Eq. 118) distinguished.

In re ANGLO-DANUBIAN STEAM NAVIGATION AND COLLIERY COMPANY. WALKER'S CASE 30

LACHES OF CONTRIBUTORY—Infant transferee 512

See INFANT TRANSFEREE. 2.

LANDS CLAUSES ACT, s. 11—*Railway Company—Rent-charge—Receiver—Leave to distrain—Lands Clauses Act*, 1845, *s.* 11.] Where land had been conveyed to a railway company in consideration of a rent-charge, and the deed gave the person entitled to the rent-charge a power to distrain on the land for arrears of the rent-charge, the Court gave the owner of the rent-charge leave to distrain on the land, notwithstanding the appointment of a receiver of the tolls, profits, and income of the undertaking of the company in a suit instituted by the owner of a similar rent-charge on behalf of himself and all the other owners of similar rent-charges who should come in and contribute to the expenses of the suit.

EYTON *v.* DENBIGH, RUTHIN, AND CORWEN RAILWAY COMPANY .. 14

2. ——————, s. 11—*Railway Company—Rent-charge—Power of Distress—Chattels assigned to Trustees—Receiver—Leave to distrain.*] Lands were conveyed to a railway company by various persons in consideration of rent-charges. The company became unable to pay the rents, and a suit was instituted by the owner of one of the rent-charges on behalf of himself and all the other owners of rent-charges who should come in and contribute to the expenses of the suit for the payment of the rent-charges; and a decree was made, and a receiver of the tolls, profits, and income of the undertaking appointed. The company, by deed, conveyed and assigned their superfluous lands and chattels to trustees upon trust for the benefit of the creditors of the company, and a suit was instituted by a creditor on behalf of himself and all other creditors entitled to the benefit of the trust deed for the administration of the trusts thereof: a decree was made, and a receiver appointed in this suit also.

Upon the application of the owner of a rent-charge for leave in both suits to distrain for arrears of rent on land conveyed by him to the company:—

Held, that he was entitled to such leave in the first suit, but not in the second.

EYTON *v.* DENBIGH, RUTHIN, AND CORWEN RAILWAY COMPANY. RICKMAN *v.* JOHNS 488

3. ——————, s. 74—*Application of Purchase-money—Leaseholds—Insufficiency of Income of Investment—Tenant for Life and Remainderman.*] The income of the investment of purchase-money of leaseholds taken under the *Lands Clauses Act* being insufficient to give a tenant for life of the lease the same benefit as she would have had if the lease had continued in existence, the Court directed a Government annuity equal to the net income from the leaseholds to be purchased, or if the funds were insufficient for that purpose, then that the dividends be paid to the Petitioner for life, and the principal half-yearly divided by the number of years unexpired of the term, and half of the quotient part of the stock to be sold, and the amount paid to the Petitioner during her life in addition to the dividends.

In re PFLEGER 426

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4. LANDS CLAUSES ACT, s. 74—*Leasehold—Tenant for Life and Remainderman—Reference to Expert—Apportionment of Purchase-money.*] Where leaseholds settled upon one for life with remainders over had been purchased under the *Lands Clauses Act*, the Court, upon making an order to invest the purchase-money, directed a reference to an actuary to ascertain how much of the capital ought to be paid in each year to the tenant for life.

In re PHILLIPS' TRUSTS 250

5. ——————————, s. 92—*Part of a House—Curtilage.*] A public house was bounded on one side by a street, and in front by a vacant piece of ground, not fenced off from the street, and separated from the house only by a narrow foot pavement, also without fence, which was ordinarily used by the public as a thoroughfare, though sometimes closed. The piece of land had been treated as passing to the lessee by every demise of the public house since 1802; it was used by customers of the public house, and it furnished the only means of approach for vehicles to the front-door of the house:—

Held, that the piece of land came within the definition of a curtilage, and was part of the house, within the meaning of the 92nd section of the *Lands Clauses Act*.

MARSON *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY 101

6. ——————————, s. 92—*Part of a Manufactory—Goit, Shuttles, and Mill-house.*] A manufactory sometimes worked, or in part worked, by water-power, had a reservoir which was supplied by a goit, into which water was turned out of a natural river at some distance off. At the point where the goit commenced there was a weir in the river; there were shuttles for regulating the flow of water into the goit, and a mill-house for the occupation of a man whose duty it was to attend to the shuttles.

A railway company gave notice to treat for certain parcels of land, including the weir, shuttles, mill-house, and parts of the bed of the river (which was included in the Plaintiff's lease, though not forming part of the manufactory), and of the goit. They proposed to pass over the shuttles, weir, mill-house, river, and goit, by bridges:—

Held, that they were bound, under the 92nd section of the *Lands Clauses Act*, to take the whole manufactory.

FURNISS *v.* MIDLAND RAILWAY COMPANY 473

7. ——————————, ss. 102, 103, 104, 107—*Common Lands—Compensation, Application of.*] Every resident freeman of the borough of *B.* had the right of annually turning on to the *Freemen's Common* (allotted under an Inclosure Act of 1795 to the corporation, as trustees of the allotment, in lieu of certain rights of common of resident freemen) one head of stock, for a period fixed from time to time by the town council, subject to a payment annually fixed by the town council for every head of stock so turned on; this right was transferable.

A portion of the *Freemen's Common* having been taken by a railway company, on a bill to obtain the direction of the Court as to the application of the purchase-money, filed by the committee appointed under sect. 102 of the *Lands Clauses Act*:—

Held, that the present resident freemen were not entitled to have the *corpus* of the purchase-money divided amongst them, but that the proper course would be to invest the money in land, to be held in trust for the freemen from time to time resident within the borough, and in the meantime that the money ought to be invested, and the dividends paid to such resident freemen at the same time in each year as they had been accustomed to enter upon the enjoyment of their rights of common.

NASH *v.* COOMBS 51

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LEASEHOLDS, Bequest of—Subsequent purchase of fee 422
See ALTERATION IN TESTATOR'S INTEREST.

———— Compensation under Lands Clauses Act—Apportionment of purchase-money 250, 426
See LANDS CLAUSES ACT. 3, 4.

LEASES AND SALES OF SETTLED ESTATES ACT .. 248, 249
See SETTLED ESTATES ACT. 1, 2.

LEGACY DUTY—"*Legacies and Bequests*"—*Real Estate devised in trust for Sale.*] A testator gave several pecuniary and specific legacies, and directed that "all the legacies and bequests" by his will given should be paid or satisfied free of duty, and he devised his residuary real estate to *A.* for life, and afterwards upon trust for sale:—

Held, upon the ordinary meaning of the words "legacies and bequests," and also upon the general construction of the will, that the legacy duty which would become payable on the proceeds of the real estate, was not payable out of the personal estate.

WHITE *v.* LAKE 188

LEGACY ON CONDITION—Bankruptcy—Forfeiture 482
See FORFEITURE CLAUSE.

LEGATEE—Attesting witness—Trust legacy 69
See ATTESTING WITNESS.

LEX LOCI CONTRACTUS—*Administration—Equitable Assets—Foreign Law—Priority—Domicil.*] Where a debt is contracted by an Englishman in a foreign country the provisions of the *lex loci contractus* do not avail to entitle the creditor to payment of his debt out of equitable assets administered in this country in priority to other creditors.

Where, therefore, an Englishman residing in *Venezuela* executed an instrument to secure repayment to *G.* of £1600, and *G.* afterwards registered the instrument in the form prescribed by the law of *Venezuela*, and by virtue of such registration became entitled, according to that law, to be paid his debt out of the general assets of the debtor in priority to other creditors:—

Held, nevertheless, that a fund in this country constituting equitable assets of the debtor must be divided among the creditors without regard to any such priority.

PARDO *v.* BINGHAM 485

LIABILITY of directors 112
See OFFICIAL LIQUIDATOR, SUIT BY.

———— to maintain sea wall 252
See SEA WALL.

LIEN—Judgment creditor—Priority—Date of return of writ 619
See JUDGMENT CREDITOR.

LIGHT AND AIR—*Easement—Garden—Contract—Derogating from Grant.*] The Plaintiff took a lease for ninety-nine years, containing the usual covenant for quiet enjoyment, of a piece of ground upon which a house had been built for him by his lessor. A garden was attached to the house, having a wall round it seven feet high. The Plaintiff's lessor subsequently let the adjoining land to the Defendant, who erected thereon a mews, having a wall twenty-three feet high, running the whole length of the Plaintiff's garden. The Plaintiff's house was not twenty years old. The Plaintiff filed a bill to restrain the erection of the Defendant's wall, on the ground that it interfered with the free access of light and air to, and the enjoyment of, his garden:—

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Held, that there was no contract, express or implied, in the covenant for quiet enjoyment, or otherwise in the lease, that the enjoyment of the garden as a garden should not be interfered with, and that, in the absence of such contract, interference with the access of light and air to the garden was not a ground for the interposition of the Court.

POTTS *v.* SMITH 311

LIQUIDATORS, Powers of the, to cancel forfeiture of shares 232
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LIS PENDENS—Production of documents—Solicitor's lien 325
See SOLICITOR'S LIEN.

LIST OF CONTRIBUTORIES—Past members—Existence of previous debts—Shares fully paid up 17, 509
See PAST MEMBERS. 1, 2.

LOCKE KING'S ACT (17 & 18 *Vict. c.* 113)—*Direction to pay Debts out of Estate—Exoneration of mortgaged Estate—Specific Devise of Part of mortgaged Estate.*] In the will of a testator dying before the 1st of January, 1868, a direction that all his debts shall be paid "out of his estate" does not exclude the operation of *Locke King's Act* (17 & 18 Vict. c. 113).

Woolstencroft v. *Woolstencroft* (2 D. F. & J. 347) followed. *Eno* v. *Tatham* (4 Giff. 181; on appeal, 32 L. J. (Ch.) 311) distinguished.

The owner of the equity of redemption of two estates comprised in the same mortgage specifically devised one estate, and left the other to pass by a residuary devise:—

Held, that he thereby signified a "contrary or other intention" within the meaning of *Locke King's Act*, so as to make the estate which passed by the residuary devise primarily liable to the whole of the mortgage debt.

BROWNSON *v.* LAWRANCE 1

LORD MAYOR'S COURT—*Fund in Lord Mayor's Court—Suit removed by Certiorari.*] Plaintiff, in an action against Defendant in the Lord Mayor's Court for £80, attached Defendant's balance at her bankers, within the Lord Mayor's jurisdiction. Defendant paid £80 into Court in lieu of special bail, discharged the attachment, and pleaded coverture. The action failed. Thereupon Plaintiff filed a bill against Defendant on the Equity side of the Lord Mayor's Court, which was removed by *certiorari* into this Court.

Motion, on behalf of the Plaintiff, to have the £80 standing in the Lord Mayor's Court paid into this Court, refused.

MACHENRY *v.* DAVIES 462

MADEIRA, Real estate in—Mortmain 534
See MARSHALLING.

MANUFACTORY, Part of—Lands Clauses Act, s. 92 473
See LANDS CLAUSES ACT. 6.

MARRIAGE SETTLEMENT—Covenant to settle future and other property 210, 269
See COVENANT TO SETTLE. 1, 2.

MARRIED WOMAN, *Specific Performance against—Trust for Sale.*] A *feme covert*, one of several devisees in trust for sale, cannot bind herself to convey the estate, and a bill by the purchaser to enforce specific performance of a contract by such trustees, dismissed.

AVERY *v.* GRIFFIN 606

MARRIED WOMAN'S estate tail in remainder 210
See COVENANT TO SETTLE. 2.

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MARSHALLING—*Will—Charities—Real Estate in Madeira—Pure Personalty—Costs.*] A bequest of pure personalty to the *Royal*, or to the *Royal Geographical*, or to the *Royal Humane Society*, is a charitable legacy.

A testator directed that all the charitable legacies bequeathed by him should be paid out of his pure personal estate, and he devised and bequeathed the residue of his real and personal estate to his executors for their own use. The only real estate was a small one in *Madeira*, which was sold under the direction of the Court. The pure personalty was insufficient:

Held, that the proceeds of the *Madeira* estate were primarily applicable to the payment of the charity bequests; and that the pure personal estate had been exempted by the testator from any contribution towards the costs of the suit, and the funeral and testamentary expenses and debts.

BEAUMONT *v.* OLIVEIRA 534

MERCHANT SHIPPING ACT (17 & 18 Vict. c. 104)—Entry of discharge of mortgage 201
See SHIP, MORTGAGE OF.

MILL HOUSE—Part of manufactory 473
See LANDS CLAUSES ACT. 6.

MINES, Sale of—Settled Estates Act—Rent for surface 248
See SETTLED ESTATES ACT. 1.

MISTAKE in recitals—Estoppel—Executor 25
See RECITALS.

MISTAKE OF ARBITRATOR—*Arbitration—Referring back the Award—Evidence of Arbitrator.*] The Court will admit evidence of an arbitrator in explanation of his award; and when it appears from such evidence that there has been a mistake on his part, either as to the subject-matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside or referred back again to the arbitrator.

In re DARE VALLEY RAILWAY COMPANY 429

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———— Cargo of ship—Stoppage *in transitu* 44
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MORTGAGE OF SHIP—Priority of registration—Entry of discharge .. 201
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MORTGAGE OF STOCK—Redemption—Replacing identical stock .. 165
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MORTGAGEE IN POSSESSION, Distress by 575
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MORTMAIN—Legacy for building parsonage 69
See ATTESTING WITNESS.

———— Real estate in *Madeira*, Gift of 534
See MARSHALLING.

NEW TRUSTEES—Trustee Act—Jurisdiction of Court 580
See TRUSTEES APPOINTED WHERE NONE BEFORE.

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NEXT OF KIN "UNDER AND ACCORDING TO" THE STATUTE —*Tenancy in Common—Practice—Appointment of Representative—* 15 *&* 16 *Vict. c.* 86*—Letters of Administration dispensed with on payment of Duty.*] By a marriage settlement personal property of the intended wife was settled, the ultimate trust being for such person or persons as at the time of the decease of the wife should be her next of kin "under and according to" the *Statute of Distributions*:—

Held, that the next of kin of the wife took as tenants in common, and not as joint tenants.

Horn v. *Coleman* (1 Sm. & Giff. 169), and *In re Greenwood's Trusts* (31 L. J. (Ch.) 119), not followed.

A surviving husband, having mortgaged the reversionary share of his deceased wife in personal estate, died. Upon the death of the tenant for life the mortgagee petitioned the Court; and in the proceedings on the Petition a person was appointed by order of the Court to represent the estates of the husband and the wife, there being no legal personal representative of either.

Upon evidence being produced that the Commissioners of Inland Revenue would be willing to accept a sum equal to administration duty, as from an administrator of the wife, without the production of an actual grant of letters of administration, if succession duty were also paid; and the Petitioner being ready to satisfy these demands.

The Court dispensed with production of letters of administration.

In re RANKING'S SETTLEMENT TRUSTS 601

NON-DELIVERY of ship—Proof under winding-up—Measure of damages 396
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NOTICE—Covenant running with land—Liability to repair sea wall .. 252
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——— of intended amalgamation—When sufficient 91
See AMALGAMATION OF COMPANIES.

NUISANCE—Breaking up streets to lay gas-pipes—Injunction 282
See BREAKING UP STREETS TO LAY GAS-PIPES.

OFFICIAL LIQUIDATOR, Costs of—Priority—Successive solicitors .. 245
See WINDING-UP PETITION. 1.

OFFICIAL LIQUIDATOR, SUIT BY—*Companies Act*, 1862, *ss.* 95, 203 —*Practice—Pleading—Liability of Directors for Misconduct—When enforced in a Suit by Liquidator, and when by Shareholders separately —Liability of Directors as Trustees—"Actio personalis moritur cum persona" not applicable to Breaches of Trust by Director—Release of Claims against Shareholder not applicable to his Liability for Misconduct as Director.*] The official liquidator of an unregistered company which is being wound up under the *Companies Act*, 1862, has power in his own name, and on behalf of the company, to institute a suit in equity against directors of the company, for the purpose of compelling them to make good losses occasioned by their misconduct in the management of its affairs.

The issue of false balance sheets, and the payment of dividends out of capital, are not proper grounds for the institution of such a suit, because the injury occasioned thereby is not common to all the shareholders, but may affect each individual in a different manner:

Semble, therefore, that for injury so caused each shareholder must take proceedings independently of the others.

Where loss was occasioned (1) by continuing the business of the company without calling a meeting to consider the propriety of dissolving it; (2) by advances to directors; both of such acts being contrary to express provisions of the deed of settlement:—

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Held, that the directors who so neglected the provisions of the deed of settlement were liable, in a suit instituted by the official liquidator, to make good the loss.

Directors who neglect the rules of a company are liable to make good to the shareholders any loss occasioned thereby; and their liability in this respect does not differ from that of ordinary trustees.

Where, therefore, directors might have learned from the books of the company the true state of its affairs:—

Held, that, although in fact they were ignorant of the state of affairs, their ignorance was no defence in a suit instituted for the purpose of compelling them to make good losses occasioned by their neglecting to take the steps which, by the provisions of the deed of settlement, they ought to have taken under the circumstances.

A release, discharging a shareholder of a company from all claims and demands which the company or the official liquidator might have against him as a shareholder or contributory of the company:—

Held, not to release him from liability for misconduct as a director.

TURQUAND *v.* MARSHALL 112

ORDER OF NOVEMBER, 1862—Rule 26 not void 368
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OUTSIDE CREDITORS of railway company, assent of, to scheme of arrangement 448, 615
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OVERSIDE ORDER—Mortgage of ship 44
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PARSONAGE—Legacy for building parsonage—Church Building Acts .. 69
See ATTESTING WITNESS.

PARTITION SUIT—*Sale—Costs*—31 *&* 32 *Vict. c.* 40.] The Act 31 & 32 Vict. c. 40, has not altered the practice of the Court with respect to the costs of a partition suit.

Where, therefore, at the hearing of a partition suit a sale was ordered under the provisions of that Act:—

Held, nevertheless, that each party must pay his own costs up to the hearing.

LANDELL *v.* BAKER 268

2. ———————— *Sale—Costs*—31 *&* 32 *Vict. c.* 40—*Infants.*] In a partition suit, where the Defendants were infants, the Court, on making a decree for sale under 31 & 32 Vict. c. 40, ordered the costs of all parties to be paid out of the estate.

OSBORN *v.* OSBORN 338

PARTNERSHIP PROFITS—Investment in land 479
See CO-OWNERSHIP OF REAL ESTATE.

PART PAYMENT OF DEBT—*Company—Proof under Winding-up—Voluntary Winding-up—Bill of Exchange—Winding-up Order under Supervision—Amount of Debt estimated at Date of Proof, not of Winding-up Order.*] A bill of exchange having been accepted by a banking company, and indorsed to a holder for value, the company passed a resolution to wind up voluntarily, and the winding-up was ordered to be continued under supervision. After this date the holder received from the drawer a composition of 8*s.* 6*d.* in the pound on the amount of the bills. After this payment the holder lodged a claim with the liquidator for the whole amount of the bills:—

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Held, that he was entitled to be admitted to prove only for the balance, after deducting the part payment.

In proof under a voluntary winding-up under supervision the person seeking to prove must allege and shew himself to be a creditor at the date of his proof for the amount he seeks to recover; and the date of the order for continuing the voluntary winding-up under supervision does not affect the question.

In re ORIENTAL COMMERCIAL BANK. *Ex parte* MAXOUDOFF .. 582

PAST MEMBERS—*Liability of—Contributory—Companies Act*, 1862, *s.* 38.] Under the 38th section of the *Companies Act*, 1862, a past member of a company which is being wound up is liable to contribute in respect of debts and liabilities contracted before he became a member.

In re BARNED'S BANKING COMPANY. HELBERT'S CASE .. 509

2. ———— *When to be placed on List—Company—Contributory.*] In the winding up of a joint stock company a past member who ceased to be a member within a year before the commencement of the winding-up, cannot be placed on the list of contributories until it is proved, first, that there was at the date of the winding-up order some existing debt or liability of the company contracted before he ceased to be a member; and, secondly, in the case of a limited company, that the shares formerly held by him have not been fully paid up.

In re CONTRACT CORPORATION. WESTON'S CASE 17

PATENT OFFICE—Duties, fees, and emoluments of 381
See CLERK OF THE PATENTS.

PERIODICAL, COPYRIGHT IN—*Injunction—First Publication—Portion of Work protected.*] *A.*, a citizen of the *United States*, published a work of which he was the author in the monthly parts, between January and December, 1867, of a magazine published in the *United States*. In October, 1867, *A.* went to reside in *Canada* for the purpose of acquiring a British copyright, and during such residence, when the work wanted six chapters for completion in the magazine, an edition of the whole was published in *London* under an agreement between *A.* and the Plaintiff, an English publisher.

A cheap reprint taken from the pages of the American magazine having been subsequently published in this country by the Defendant:—

Held, that the copyright was divisible and could be claimed for a portion of the book only, and accordingly the publication by Defendant of the last six chapters of the work was restrained by injunction.

LOW *v.* WARD 415

PERSONAL AND REAL ESTATE, Blending of 593
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PERSONAL ESTATE—Limited like real estate 523
See REFERENTIAL BEQUEST.

"PERSONAL REPRESENTATIVES"—*Will—Construction—"Personal Representatives" held to mean "Statutory Next of Kin"—Son "entitled upon his Father's Decease."*] Testator bequeathed a legacy of £2000 upon trust for a married daughter, *F.*, for life, then for her husband for life, and after the death of the survivor for such persons "related by blood" to *F.* as she should appoint; and in default of appointment to transfer the same to such persons as would be "the personal representatives" of *F.* in case she had died sole and unmarried. By a codicil, the testator, in reciting the above bequest, referred to the above trusts as being trusts for the benefit of his

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daughter's "relations and next of kin." *F.* died in the testator's lifetime:—

Held, that by the "personal representatives" of *F.* were meant the persons who were her statutory next of kin at the testator's death.

Stockdale v. *Nicholson* (Law Rep. 4 Eq. 359) distinguished.

By the codicil the testator declared that £1000, part of the said sum of £2000, should be held for the absolute use and benefit of his son, *H.*, but if he should be dead when the said sum of £1000 should "descend and come" to him under the trusts therein contained, then that the same should be paid to all the children of *H.* "except the one entitled to any real property upon his father's decease," share and share alike.

Upon the death of *H.*, in 1862, after the testator's death, his eldest son became next tenant for life in remainder of the settled estates, expectant on the death without issue of the then tenant for life in possession, which happened in 1863. The surviving tenant for life of the legacy died in 1867:—

Held, that the eldest son of *H.* was excluded from participation in the £1000.

In re GRYLLS' TRUSTS 589

PETITIONING CREDITOR IN WINDING-UP—Costs of—Priority 245, 519
See WINDING-UP PETITION. 1, 2.

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See WINDING-UP PETITION. 3.

PLEADING—Representation of various classes of shareholders 143
See PREFERENCE SHAREHOLDER.

PORTION OF BOOK—Copyright in 415
See PERIODICAL, COPYRIGHT IN.

PORTIONS, DOUBLE—*Satisfaction of—Covenant to pay Annuity—Gift of Annuity by Will—Direction to pay Debts.*] Upon the marriage of Mrs. *P.*, one of the two daughters of *G.*, the father covenanted with the trustees of the marriage settlement to pay to them the principal sum of £12,000, with interest until payment, and also an annuity of £300 during the life of Mrs. *P.*, upon trust for her, for her separate use, without power of anticipation. *G.* subsequently in his lifetime advanced his other daughter *L.* the like principal sum of £12,000. By his will *G.* charged his real estate with an annuity of £400 in favour of Mrs. *P.*, for her separate use, and with an annuity of £1000 in favour of *L.*, and in the event of the failure of certain limitations he charged the same real estate with two additional annuities of £1500 each, in favour of Mrs. *P.* and *L.*, and he devised the estates charged with these four annuities in manner therein mentioned, and bequeathed his residuary personal estate subject to the payment of his debts upon the trusts therein mentioned:—

Held, that, having regard to the general tone of the will, and particularly to the direction for the payment of debts, Mrs. *P.* was entitled to the annuity of £400 in addition to that of £300 covenanted to be paid by the testator.

PAGET *v.* GRENFELL 7

POST-OBIT BOND 468
See VOLUNTARY BOND.

POWER OF BORROWING—*Company—Issue of Debentures to Creditors in discharge of Debts—Composition with Creditors—Contemplation of Bankruptcy by a Company—Pressure—Fraudulent Preference—Companies Act*, 1862, *s.* 164.] Debentures issued by a company under a

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general power of borrowing, in part discharge of existing debts, are valid.

A company, whose directors were empowered to issue debentures, and to borrow money "upon mortgage or otherwise," issued mortgage debentures. Some of these were issued in fulfilment of contracts with tradesmen, whereby they agreed to furnish goods to the company on being paid partly in cash and partly in debentures. Others were issued to the tradesmen as security for their cash balances. Others were issued on the 18th of October in pursuance of an arrangement come to on the 29th of the previous September, whereby the company agreed to pay the creditors 5*s.* in the pound in one month, 5*s.* in the pound in the following January, and the remaining 10*s.* in debentures. The only dissentient creditors came into the arrangement on the 29th of October, but on that day a winding-up Petition was presented, and they did not receive any debentures. A voluntary winding-up, under a resolution passed on the 10th of November, was afterwards continued under supervision:—

Held, that the debentures respectively were not invalidated, either by reason of their having been issued in part satisfaction of existing debts, or by the failure of the arrangement of the 29th of September, or on the ground of fraudulent preference under the *Companies Act*, 1862, s. 164; and that they were all valid mortgages.

Circumstances which amount to fraudulent preference considered.

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———— Costs of Respondents to Petition 335, 336
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———— Evidence after decree in creditor's suit 464
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———— Examiners out of jurisdiction—Form of appointment .. 467
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———— Payment into Court—Money in Lord Mayor's Court 462
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———— Revivor after assignment by Plaintiff 251
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———— Time—Order to do an act "forthwith" 521
See "FORTHWITH."

———— Trustee Act—Trustees of creditors' deed 460
See TRUSTEES OF CREDITORS' DEED.

PREFERENCE SHAREHOLDER, *Suit by, on behalf of himself and all other Shareholders—Railway Company—Liability of Directors of a Company whose Functions have ceased—Representation of other Classes of Shareholders.*] Suit by a preference shareholder in a railway company, with three classes of shareholders, on behalf of himself and all other shareholders, against the directors, alleging that the undertaking had some years previously been sold to another company, from whom a sum of stock had been received by way of consideration more than sufficient to pay the liabilities of the company, and that the functions of the company had ceased; and praying an account against the directors, that the surplus might be divided among the shareholders, and the company wound up:—

Held, that the directors were liable to account for the funds remaining in their hands, and that the Plaintiff was entitled to a decree, subject to the shareholders whose interests were different from the Plaintiffs' being represented before the Court.

CRAMER *v.* BIRD 143

PRESBYTERIAN DISSENTERS—*Baptists—Dissenters' Chapels Act*—(7 & 8 *Vict. c.* 45)—*Charity—Cy-près.*] Under wills dated between 1716 and 1803, various funds were bequeathed for the ministers, and otherwise for the benefit of Protestant Dissenters called "*Presbyterians*," at *D.* It appeared that there had existed a Presbyterian chapel at *D.* since 1662, that some *Baptists* had associated with them, and that the Baptist element had in course of time so much increased, that in 1863 only a few of the members were Presbyterian, and since 1803 the ministers of the chapel had been Baptist. An information was filed in 1863, raising the question who were entitled to these funds, which were proved to have been enjoyed by the minister and congregation of the chapel for the last seventy years, and in 1865 a congregation was formed by persons claiming to be strict *Presbyterians*, who now claimed the funds as such:—

Held, that the use of the term "*Presbyterian*" did not amount to a requisition that any particular religious doctrines or mode of worship should be taught or observed; and that under the *Dissenters' Chapels Act* (7 & 8 Vict. c. 45) the usage for the last twenty-five years must be held conclusive, and the congregation who had enjoyed the funds must be declared entitled:

Held also, that, upon the evidence, there had been no strictly Presbyterian congregation at *D.* for the last century, and that the funds would, if necessary, be applied *cy-près* in favour of the congregation in possession.

ATTORNEY-GENERAL *v.* BUNCE 563

PRINCIPAL AND SURETY—Right by surety to file bill for administration of principal's estate—Bill *quia timet* 410
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PRIVATE INJURY—*Public Right—Form of Suit—Right of Way—Non-user—Abandonment.*] Where a Plaintiff suffers a particular injury from the obstruction of a public way, a bill for an injunction will lie, and the Attorney-General need not be a party. Circumstances which amount to abandonment of an easement considered.
COOK *v.* MAYOR AND CORPORATION OF BATH 177

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PROOF UNDER WINDING-UP—Amount to be estimated at date of proof—Part payment of bill of exchange 582
See PART PAYMENT OF DEBT.

PUBLIC CONVENIENCE—*Railway Company—Obstruction of Road—Injunction.*] Where a railway company have diverted a road *ultrà vires*, but with a *bonâ fide* view to the convenience of the public, a Court of Equity will not compel them to replace the road so as to make their work *intrà vires*, if the result will be to cause greater inconvenience to the public, or the complaining section of the public.
In such a case an information was dismissed without costs, and without prejudice to the Attorney-General proceeding against the company at law.
ATTORNEY-GENERAL *v.* ELY, HADDENHAM, AND SUTTON RAILWAY COMPANY 106

PURCHASE OF SHARES—Specific performance .. 149, 496, 505, 641
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See PUBLIC CONVENIENCE.

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——— Right of unpaid debenture holder 437
See DEBENTURE HOLDER.

RECITALS, *Mistake in—Estoppel—Executor of Executor—Renunciation.*] A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part.

Where, therefore, a deed of release and indemnity to the executor of a testator contained a recital to the effect that out of the testator's residuary estate the executor had retained the sum of £19 8*s.*, being the amount of the legacy duty on the bequests contained in the will, and in fact the sum so mentioned was only part of such legacy duty:—

Held, that the executor, who was afterwards called on to pay the balance of the duty, was not precluded from recovering such amount from the estates of the residuary legatees under the covenant for indemnity in the deed.

An executor of an executor who has accepted the executorship of the latter testator cannot renounce the executorship of the former.

BROOKE *v.* HAYMES 25

REDEMPTION—Stock mortgage—Replacing identical stock 165
See STOCK MORTGAGE.

REFERENTIAL BEQUEST—*Vested Interest—Tenant in Tail—Personalty.*] A testator devised and bequeathed his real and personal estates to trustees, and directed them, after converting and making certain payments out of his personal estate, to invest the surplus and the annual proceeds of his real and personal estates during the time that any person beneficially interested in these estates should be under twenty-one, in order to accumulate the personal estate. He then directed that, after the payment of certain legacies, the trustees should hold all his real and personal estates for his grandson, the first or eldest son then living of his daughter *C.*, during his life, and after his decease, for his first and other sons in tail, with remainders over in favour of *C.*'s other children. The will contained a proviso that such person as should be entitled to an estate tail in possession in the real estate

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should not be absolutely entitled to the leasehold and personal estates until he should attain twenty-one; that the leasehold and personal estates should absolutely belong only to such person as should first attain the age of twenty-one, and become entitled to an estate tail in possession in the real estate, and that in the meantime the leasehold and personal estates should remain subject to the trusts declared.

Lord *Eldon*, in *Marshall* v. *Holloway* (2 Sw. 432), declared that the direction to accumulate was void for remoteness. At that time *C.* had several children. *H.*, the eldest son and tenant for life, was under the decree entitled to, and had been in possession of, the rents and profits of the real and leasehold, and the proceeds of the personal estates, and he was still alive. His eldest son, *C. B.*, died in 1863 under twenty-one, leaving two brothers surviving, the elder of whom, *H. E.*, had since attained twenty-one:—

Held, that *H. E.*, who was in possession of the first estate of inheritance, and had attained twenty-one, was, subject to his father's life interest, absolutely entitled to the leasehold and personal estates.

HOLLOWAY *v.* WEBBER. HOLLOWAY *v.* HOLLOWAY 523

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——— Rectification of—Delay by infant 455, 512
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RELIGIOUS DOCTRINES—Dissenting charity — Presbyterians — Dissenters' Chapels Act 563
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REMOTENESS—Will—Gift to children of woman past childbearing .. 319
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RENT-CHARGE on railway company—Lands Clauses Act, s. 11—Power of distress 14, 488
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RENUNCIATION of executorship—Executor of executor 25
See RECITALS.

RESPONDENTS TO PETITION—*Costs of Appearance—Trustees—Practice—Costs—Petition for Payment of Dividends.*] Costs of trustees who were served with and appeared upon Petition by tenant for life for payment of dividends *held* to be payable out of *corpus*.
In re GORDON'S TRUSTS 335

2. ——— *Costs—Persons unnecessarily served—Persons necessarily served but claiming no Interest.*] Persons unnecessarily served with a Petition, and persons necessarily served but claiming no interest in the subject matter of the Petition, are entitled to their costs of appearing upon the hearing of the Petition.
CLARK *v.* SIMPSON 336

REVIVOR AND SUPPLEMENT—*Proceedings taken after Assignment by a Plaintiff.*] Where one of two Plaintiffs had assigned his interest

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after decree, and the Chief Clerk's certificate had been made after the assignment, the common order of revivor was made against the assignee without prejudice to any question whether he was to be bound by the certificate.
VIBART *v.* VIBART 251

REVOCATION — *Will — Codicil — Charge — Invalid Appointment.*] A testator, having a power by will to charge certain hereditaments with £7000, to be divided amongst his children in such shares as he should by will appoint, and in default amongst them equally, by his will charged the hereditaments with the £7000, and directed that £4000, part thereof, should be paid to his younger son, and the remaining £3000 to his three daughters equally. By a codicil he revoked the appointment or charge of £7000 made by his will, and charged the same hereditaments with the payment of £7000 to the younger son alone:—
Held, that though the appointment made by the codicil was invalid, the revocation nevertheless took effect.
Tupper v. *Tupper* (1 K. & J. 665) followed. *Onions* v. *Tyrer* (1 P. Wms. 343) explained.
QUINN *v.* BUTLER 225

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See PORTIONS, DOUBLE.

SCHEME OF ARRANGEMENT — *Railways Act*, 1867 (30 & 31 *Vict. c.* 121, *s* 18)—*Confirmation—Assent of Outside Creditors.*] A scheme of arrangement between a railway company and their creditors contained a clause providing that all the creditors other than landowner creditors and *elegit* tenants, should receive in discharge of their claims fully paid-up shares to the amount of such claims, they releasing their debts and claims, and giving up their securities. Upon a petition for confirmation of the scheme, some of the outside creditors appearing and dissenting, the Court refused to make the order, and dismissed the petition.
In every case where a scheme contains a clause seriously affecting the rights of outside creditors, the Court will require the assent in writing of every such outside creditor before it confirms the scheme.
In re BRISTOL AND NORTH SOMERSET RAILWAY COMPANY .. 448

2. ——————— *Railways Act*, 1867 (30 & 31 *Vict. c.* 127, *s.* 18)—*Inrolment—Application by outside Creditors*

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—Suspense of Inrolment pending Motion for leave to file Petition for Re-hearing—General Order of January 24, 1868, *Rules* 23–28, 35.] Where a scheme of arrangement between a railway company and their creditors had been confirmed, inrolment of the confirmation order was restrained on the application of outside creditors who had, within thirty days from the date of the order, set down a motion for leave to file a Petition for a re-hearing.

In re DEVON AND SOMERSET RAILWAY COMPANY. (2.) 615

3. SCHEME OF ARRANGEMENT—*Railways Act*, 1867 (30 & 31 *Vict. c.* 127, *s.* 9)—*Scheme of Arrangement—Scire Facias—Property of Company—Companies Clauses Act*, 1845.] After publication in the *Gazette* of notice of the filing of a scheme of arrangement by a railway company under the *Railway Companies Act*, 1867, creditors of the company will not be allowed, without first obtaining leave of the Court, to issue execution upon a writ of *scire facias* obtained pursuant to sect. 36 of the *Companies Clauses Act*, 1845, against shareholders of the company; the amount of capital remaining to be paid, in respect of which the *scire facias* has been obtained, being property of the company within sect. 9 of the Act of 1867.

In re DEVON AND SOMERSET RAILWAY COMPANY. (1.) 610

SCOTCH EXECUTOR—*Leaseholds in England—Power to sell*—21 & 22 *Vict. c.* 56, *s.* 12—*Contract of Sale—Vendor not named—Statute of Frauds—Signature for "Vendors" not then ascertained.*] Where confirmation of the executor of a person who has died domiciled in *Scotland* has been sealed with the seal of the Court of Probate, in manner provided by 21 & 22 Vict. c. 56, s. 12, the executor has all the powers of an ordinary English executor, and may sell and dispose of leaseholds in *England*, although they are specifically bequeathed, and although, by the law of *Scotland*, an executor cannot deal with leasehold property in that country.

The particular of sale of a leasehold house stated that it was the property of Admiral *F.* deceased, and that the sale was by direction of his executors, not naming them. A memorandum of the sale, endorsed on the particular was signed by the auctioneers as agents "for the vendors." Admiral *F.* was a domiciled Scotchman, and had, by a testamentary instrument in the Scotch form, named seven persons, and the acceptors of them, as executors. Two only accepted office, and confirmation was granted to them subsequently to the contract of sale:—

Held, that the contract was valid, and specific performance of it decreed at the suit of the executors.

HOOD *v.* LORD BARRINGTON 218

SCRIP CERTIFICATES—*Conversion into Shares—Sale before Conversion—Company.*] The prospectus of a railway company, issued after its incorporation, stated the capital as £255,000, in 5100 provisional scrip certificates to bearer, of £50 each, £1 to be paid on application, and £4 on allotment; and that, "on registration of the scrip, of which due notice will be given, the certificates for £50 will be divided into five shares of £10 each."

On the application of *A.*, scrip certificates were allotted to him, which he shortly afterwards, without taking any steps to convert them into shares, sold in the market. These scrip certificates, together with many others which had been in like manner parted with by their allottees, were re-purchased, on behalf of the company, by agents of the directors, and more than two years afterwards were entered upon the register as shares (each scrip certificate representing five shares) in the names of *A.* and the other allottees:—

Held, that *A.* was under no obligation to convert the scrip certifi-

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cates into shares, and that, on selling them in the market, as he was entitled to do under the terms of his contract, he was relieved from all liability, and could not be retained on the register as the holder of the shares represented by these scrip certificates.

EUSTACE *v.* DUBLIN TRUNK CONNECTING RAILWAY COMPANY .. 182

SEA LEVEL—Lands under—Liability to repair sea wall 252
See SEA WALL.

SEA WALL—*Purchaser of Land under Sea-level—Liability to contribute to Repair of Sea-wall—Notice—Covenant running with Land—Jurisdiction.*] The purchaser of lands situate below the level of the sea is bound to inquire how all walls necessary for the protection of his property against the encroachments of the sea are maintained.

Lands situated below the level of the sea in *Broomhill Level*, *Guildford Level*, and *Walland Marsh*, were, previously to 1794, held in undivided shares. In that year these lands were partitioned by a deed containing a covenant that the expense of keeping and maintaining the walls and gutts of and belonging to the lands thereby divided, should be borne by the owners thereof, and should be payable out of the said lands by an acre-scot:—

Held, that purchasers of parts of the lands in *Guildford Level* and *Walland Marsh*, who had no actual notice of the covenant, were nevertheless bound thereby, and that there was jurisdiction in Equity to deal with the case. Declaration that Defendants were liable to contribute to the repair of a sea-wall along the sea boundary of *Broomhill Level*, with consequential relief, although the Defendants were also liable to contribute to the maintenance of sea-walls along the boundaries of the levels in which their lands were situated.

Semble, that the covenant was one which would run with the land although the assigns of the covenantors were not named.

Pyer v. *Carter* (1 H. & N. 916) and *Suffield* v. *Brown* (33 L. J. (Ch.) 249) commented on.

MORLAND *v.* COOK 252

SECURITIES FOR BILLS OF EXCHANGE—*Insolvency of Acceptor and Guarantor—Security given by Acceptor to Guarantor—Appropriation.*] Company *A.* guaranteed bills for £35,000 accepted by company *B.*, and company *B.* assigned to company *A.* certain property as security for the payment of the bills. Both companies were wound up by the Court, and the holders of the bills, who had no notice of the security, proved against both estates for the whole amount of the bills, and recovered from company *A.* £21,000, and from company *B.* £5250; afterwards the security was realized, and produced £23,500:—

Held, that the proceeds of the security were part of the estate of company *A.*, and were divisible among its creditors.

Ex parte Waring (19 Ves. 345) considered.

In re JOINT STOCK DISCOUNT COMPANY. LODER'S CASE .. 491

SEPARATE USE—Legacy—Covenant to settle future property .. 269
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SETTING UP IN BUSINESS—Husband of married daughter 322
See ADVANCEMENT.

SETTLED ESTATES ACT—*Jurisdiction—Sale of Mines, reserving Rent for Surface damaged by Working.*] The Court has jurisdiction under the *Leases and Sales of Settled Estates Act* to order a sale of mines apart from the surface, with rights of using the surface for the workings, reserving a rent in respect of the surface damaged from time to time.

In re MILWARD'S ESTATE 248

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2. SETTLED ESTATES ACT, s. 36—*Person of unsound Mind not found so by Inquisition—Consent, how given.*] Consent to an application under the *Leases and Sales of Settled Estates Act*, may be given on behalf of a person of unsound mind not found so by inquisition, by a guardian appointed by the Court for the purpose.
In re VENNER'S SETTLED ESTATES 249

SHIP—Completion of voyage 44
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SHIP, MORTGAGE OF—*Priority—Registration—Entry of Discharge—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 68.] In 1862 the owner of a ship mortgaged it to *G.*, who transferred the mortgage by way of sub-mortgage to *P.*, and the mortgage and transfer were registered. In October, 1863, *G.* paid off *P.*'s sub-mortgage, and the original mortgage was entered in the register as discharged, but the mortgage deed was returned to *G.*, who shortly afterwards deposited it with *W.* by way of sub-mortgage. In October, 1864, *P.* executed a re-transfer of the mortgage to *G.*, and *G.* executed a transfer to *W.*, and both these transfers were registered, the registrar at the same time entering a note that the entry of discharge was erroneous. In March, 1865, *G.* paid off *W.*'s sub-mortgage, but the mortgage was not re-transferred. In May, 1865, the mortgagor gave *G.* another mortgage of the ship to secure an amount which included the money due on the original mortgage, and this mortgage was registered. In October, 1865, the second mortgage was transferred to *B.*; in March, 1866, *G.* agreed that *W.*, who had no notice of the transfer to *B.*, should hold the original mortgage to secure an account current between them, and in July, 1866, *B.* registered his transfer:—
Held, that as *W.* became, in March, 1865, a trustee of the original mortgage (if it was a subsisting mortgage) for *G.*, and as the money secured by it was included in the subsequent mortgage which was transferred to *B.* before the new agreement with *W.*, *B.* had priority over *W.*
Semble, that under the 68th section of the *Merchant Shipping Act*, 1854, the entry of discharge destroyed the original mortgage as against subsequently registered mortgages, and that all the subsequent entries relating to it were void.
BELL *v.* BLYTH 201

SOLICITOR—Official liquidator—Successive solicitors' costs paid rateably 245
See WINDING-UP PETITION. 1.

———— Solicitors acting by common agent 7
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———— Solicitor's Lien—Discharge by client 325
See SOLICITOR'S LIEN.

SOLICITOR'S LIEN — *Solicitor discharged by Client—Production of Documents relating to pending Litigation.*] Although a solicitor who discharges himself cannot set up a lien for costs as a reason for not delivering up papers necessary to enable his client to proceed with pending matters in litigation to which they relate; yet a solicitor who has been discharged by the client may set up such lien, and will not be ordered to produce or deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in prosecuting or defending his claims. Such lien is a general one, and extends to all costs due from the client to the solicitor.
In re Bevan and Whitting (33 Beav. 439), distinguished.
In re FAITHFULL, AND *In re* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY 325

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See STOCK MORTGAGE.

STOCK MORTGAGE—*Mortgage of Stock—Whether identical Stock must be returned.*] *A. & B.*, stockbrokers, borrowed, on behalf of the Plaintiff, a sum of money, for a term of three months, from the Defendants, who were also stockbrokers, upon the security of certain railway stock, which was transferred by the Plaintiff into the name of one of the Defendants' firm. At the expiration of the term the loan was repaid with interest, and the Defendants, who, pending the loan, had sold the Plaintiff's stock, purchased other stock, and re-transferred a similar amount to the Plaintiff. The Plaintiff claimed to be entitled to the amount of profit which the Defendant had realized :—

Held, that the Plaintiff was entitled to sue as principal in the transaction; that the Defendants were not justified, either by law or by the custom of the *Stock Exchange*, in parting with the security during the currency of the loan, but were bound to return the identical stock pledged; and that the Plaintiff was entitled to recover from the Defendants the amount of profit realized by their dealings with the stock.

LANGTON *v.* WAITE 165

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STOPPAGE IN TRANSITU—*Overside Order in favour of Mortgagees —Termination of Ship's Voyage.*] Goods were shipped by *A.*, a firm at *Calcutta*, to the order of *B.* in this country. *B.* pledged the bill of lading to *C.*, and afterwards became bankrupt. On the arrival in the *Thames* of the ship in which the goods were, *C.* obtained from the brokers, on payment of the freight, an overside order for the delivery of the goods. On presenting this order to the chief officer on board the ship the lighterman employed by *C.* to bring away the goods was told that he should have them as soon as they could be got at. In the meantime, before the ship broke bulk, *A.*, by their agents in this country, served notice upon the captain and agents of the ship to stop the delivery of the goods to any person other than themselves:—

Held, that by the mere promise to deliver them to *C.* when they could be got at the goods were not brought into the actual or constructive possession of *B.* so as to prevent *A.*, the unpaid vendor, from exercising his right of stoppage *in transitu*; and accordingly that *A.* was entitled, as against the assignees in bankruptcy of *B.*, to the surplus proceeds of the goods after satisfying the charge of *C.*

COVENTRY *v.* GLADSTONE 44

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See INTEREST ON DEBTS.

SUIT NOT INSTITUTED BY COMPANY—*Injunction—Company —Ultrà Vires—Illegal Application of Funds.*] A railway company has no power to expend its funds in the prosecution of a suit not instituted by it, and a Court of Equity will, at the instance of a shareholder, restrain it from doing so, without going into the question whether or not the suit is proper, or for the benefit of the company.

KERNAGHAN *v.* WILLIAMS 228

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TRADES UNIONS—Intimidation of workmen 551
See INTIMIDATION OF WORKMEN.

TRANSFER OF SHARES—*Power of Directors to reject Transfer—Rectification of Register.*] In addition to any discretion expressly conferred

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on them by the articles of association, the directors of a company have vested in them a discretion to refuse to register a transfer of shares, in cases where the proposed transfer would be contrary to the interests of the shareholders. Such discretion is, however, not arbitrary, but must be exercised in a just and reasonable manner.

Where, therefore, a company was in difficulties, and a transfer was made to a person whose address was incorrectly given in the transfer, and who could not be found:—

Held, that the directors were justified in refusing to register the transfer; and the Court refused, after a winding-up order had been made, to rectify the register by inserting the name of the transferee, it appearing that the transfer was made for the purpose of avoiding liability, and that the transferee was not a person of means.

In re SMITH, KNIGHT, AND CO. WESTON'S CASE 238

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TRUST, Indefinite—Trustees not to take beneficially 419
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TRUSTEE ACTS—Creditors' deed—New trustees of 460
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TRUSTEES APPOINTED WHERE NONE BEFORE—*Will appointing no Trustees—Trustee Act—Equitable Jurisdiction to appoint Trustees.*] The Court has inherent jurisdiction in a cause to appoint trustees of a will in a case where no trustees were originally appointed by the testator.

DODKIN *v.* BRUNT 580

TRUSTEES OF CREDITORS' DEED—*Death of Trustees—Appointment of New Trustees by Court of Chancery—Trustee Acts.*] Where the trustees of a trust deed registered under the *Bankruptcy Act*, 1861, have all died, there being no power in the deed of appointing new trustees, the Court of Chancery has jurisdiction, under the Trustee Acts, to appoint new trustees.

In re PRICE'S TRUST DEED 460

TRUSTEES' COSTS—Appearance on petition for payment of dividends .. 335
See RESPONDENTS TO PETITION. 1.

ULTRÀ VIRES—Promotion of suit not instituted by company 228
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ULTRÀ VIRES—Public convenience—Diversion of road 106
See PUBLIC CONVENIENCE.

UNDUE INFLUENCE—*Spiritualism.*] *A.*, a widow, aged seventy-five, within a few days after first seeing *B.*, who claimed to be a "spiritual medium," was induced, from her belief that she was fulfilling the wishes of her deceased husband, conveyed to her through the medium of *B.*, to adopt him as her son, and transfer £24,000 to him; to make her will in his favour; afterwards to give him a further sum of £6000; and also to settle upon him, subject to her life interest, the reversion of £30,000 (these gifts being made without consideration, and without power of revocation):—

Held, that the relation proved to have existed between them implied the exercise of dominion and influence by *B.* over *A.*'s mind; and, consequently, that as *B.* had failed to prove that these voluntary gifts were the pure, voluntary, well understood acts of *A.*'s mind, they must be set aside.

LYON *v.* HOME 655

UNITY OF POSSESSION—"Ways hitherto enjoyed"—Vendor and purchaser 36
See "WAYS HITHERTO ENJOYED."

UNLIQUIDATED DAMAGES—*Profits—Winding-up—Companies Act*, 1862, *s.* 158—*General Order of Nov.* 1862, *Rule* 25.] In April, 1865, company *A.* entered into a contract with company *B.* to repair a steamship within the period of sixteen weeks from the 1st of April, 1865, for £1950. On the 7th of August, 1865, an order was made for winding up company *A.* At this time the repairs of the ship were not completed, and the period (which had been extended to twenty weeks in consequence of a lock-out in the iron trade) had not expired. After some delay, the repairs were completed by the official liquidator of company *A.* under orders obtained in the winding-up, and in May, 1866, the ship was delivered to company *B.*

Damages having been claimed by company *B.* for loss of charter-parties and depreciation in value of the ship between the time fixed by the contract for her completion and the time of her actual delivery:—

Held (1), that the claim was not barred by s. 158 of the *Companies Act*, 1862, nor by the 25th rule of the General Order under that Act, and (2), following *Cory* v. *Thames Ironworks Company* (Law Rep. 3 Q. B. 181), that the damages recoverable would be the net profit which company *B.* might have obtained by chartering the vessel if she had been delivered at the time fixed by the contract instead of in May, 1866.

In re TRENT AND HUMBER COMPANY. *Ex parte* CAMBRIAN STEAM PACKET COMPANY 396

UNREGISTERED COMPANY—Suit by official liquidator 112
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UNSOUND MIND, Person of—Not so found by inquisition 249
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VENDOR AND PURCHASER—Contract for sale by married woman .. 606
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——————— Grant of right of way—"Ways heretofore enjoyed" 36
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VESTING—Period of—Death before share "received" 59
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——— Period of ascertaining class—How affected by power of advancement 215
See CHILDREN WHO SHALL ATTAIN TWENTY-ONE.

———, Referential bequest — Tenant in tail absolutely entitled to personalty 523
See REFERENTIAL BEQUEST.

VOLUNTARY BOND—*Voluntary Settlement—Post-obit Bond—13 Eliz. c. 5.*] A creditor under a voluntary *post-obit* bond is as much entitled to the benefit of the statute of the 13 Eliz. c. 5, as any other creditor.

Where a testator, having executed a voluntary *post-obit* bond for securing an annuity of £100 to his daughter-in-law for her life, afterwards made a voluntary settlement, from and after his decease, in favour of his widow and child, comprising all his property (except about £300), and before his death acquired only about £1000 more:—

Held, that the settlement was void under the statute as against the bond creditor.

ADAMES *v.* HALLETT 468

VOLUNTARY SETTLEMENT—*Post-obit* bond 468
See VOLUNTARY BOND.

VOLUNTARY WINDING-UP, *Time of Commencement of—Cancelling of Forfeiture by Liquidators—Companies Act*, 1862, *ss.* 129, 130, 131.] When a company is wound up voluntarily by means of a preliminary and a confirmatory resolution under sects. 129 and 130 of the *Companies Act*, 1862, the commencement of the winding-up dates from the passing of the second resolution.

Where a forfeiture of shares has been validly made by the directors of a company before the commencement of a winding-up, the liquidators have no power, under sect. 131 of the Act, to cancel such forfeiture.

Accordingly, where the directors of a company had forfeited the shares of *D.* for non-payment of calls after the passing of a preliminary resolution to wind up, and before its confirmation, and the liquidators had subsequently agreed with *D.* to cancel the forfeiture:—

Held, that the forfeiture was valid; that the liquidators had no power to cancel it; and that *D.* could not be made a contributory.

In re CHINA STEAM SHIP COMPANY. DAWES' CASE 232

———————, Commencement of—Supervision order 496
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———————, Proof under—Time of estimating amount of debt 582
See PART PAYMENT OF DEBT.

WAY, Right of—Obstruction—Abandonment 177
See PRIVATE INJURY.

"WAYS HERETOFORE ENJOYED"—*Vendor and Purchaser—Grant of Right of Way—Unity of Possession.*] The owner of two adjoining closes, *A.* and *B.*, who had during the unity of possession made

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and used, for his own convenience for agricultural purposes, a way across *B.* to *A.*, executed a conveyance of close *A.* to a purchaser with these general words, "together with all ways, easements, and appurtenances thereto appertaining, and with the same now or heretofore occupied or enjoyed." The purchaser, who had access to *A.* from other land of his own, claimed under the conveyance the right to use the roadway over *B.* :—

Held, that as there was no roadway over *B.* to *A.* before the unity of possession, the right to use it did not pass under the general words of the conveyance.

The case of *Plant* v. *James* (5 B. & Ad. 791) considered.

THOMSON *v.* WATERLOW 36

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See BLENDING OF REAL AND PERSONAL ESTATE.

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See VOLUNTARY WINDING-UP.

——————— Voluntary, under supervision—Time of commencement 496
See CUSTOM OF STOCK EXCHANGE. 2.

WINDING-UP PETITION—*Costs of Petitioner and Official Liquidator—Deficient Assets—Costs—Priority—Petitioner and Official Liquidator—Successive Solicitors of Official Liquidator.*] In the winding up of a company the Petitioner's costs are the first charge upon the estate, and must be paid in full in priority to the costs of the official liquidator.

Where the official liquidator changes his solicitors, and the assets are not sufficient to pay the whole of his costs, the bills of costs of the successive solicitors will, as a general rule, be paid rateably, so far as the assets will extend, but where the first solicitor gave up documents to the second solicitor upon an undertaking that his costs should be paid out of the estate, his costs were paid in full in priority to those of the second solicitor.

In re AUDLEY HALL COTTON SPINNING COMPANY 245

2. ——————— *Costs of Petition—Costs payable out of Estate—Priority.*] Where in the course of winding up a company orders have been made for the payment of costs out of the estate, the Petitioners in the winding-up are alone entitled to priority.

In re MARLBOROUGH CLUB COMPANY. *Ex parte* PERCIVAL .. 519

3. ——————— *Discretion of the Court—Company—Winding-up—Creditor's Petition ordered to stand over—Companies Act*, 1862, *ss.* 86, 91.] The Court is not bound *ex debito justitiæ* to make an immediate order to wind up a company upon the Petition of a creditor whose debt is admitted and not paid, but may, under the 86th and 91st sections of the *Companies Act*, 1862, order the Petition to stand over to enable the company to make arrangements for the payment of its debts, and the carrying on of its business, and will make such order where there is a reasonable hope of such arrangements being made.

In re BRIGHTON HOTEL COMPANY 339

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